Supreme Court, U.S.
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No. 06-328

IN THE

Supreme Court of the United States

JOHN H. CARNEY; JAMES R. FISHER,
PETITIONERS

v.

UNITED STATES OF AMERICA; OFFICE OF THRIFT SUPERVISION; FEDERAL BUREAU OF INVESTIGATION, One or more unknown officials of the Department of Justice, Federal Bureau of Investigation; FRED TEED; ROLF D. COBURN, also known as Rolf Nordstrom; KAREN BRUTON; KEN KLEIN; RICHARD RICCABONO; VINCENT G. FAZZIO; JENNIFER GANT; BRAD LAMBERT; RICHARD H. KAMP; PAMELA I. DEMPSEY; JACK HINTON; EDWARD KRAMER,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals failed to conduct a *de novo* review of the district court's grant of summary judgment in favor of the defendants.

2. Whether the Court of Appeals failed to conduct a *de novo* review of the trial court's 12(b) dismissal of Petitioner's state tort claims presented under the Federal Tort Claim Act.

3. Whether violations of the constitutional "fair trial" rights not to be convicted through the use of evidence falsified by the government, *Napue v. Illinois*, 360 U.S. 264 (1959)), and not to be deprived of exculpatory/impeachment evidence, as recognized in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), give rise to a federal claim for damages against federal investigative officers who participated in the denial of such rights.

4. Whether the mandates of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972), and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), extend to federal investigative officers and members of the prosecution team for purposes of imposing civil liability in a *Bivens*-type action, *Bivens v. Six Unknown Named Agents Of Federal Bureau Of Narcotics*, 403 U.S. 388; 91 S. Ct. 1999; 29 L. Ed. 2d 619 (1971).

5. Whether federal investigative officers are immune from *Bivens* claims for damages for violations of *Brady*, *Giglio*, and *Napue*.

6. Whether the district court's application of the Westfall Act, 28 U.S.C. § 2679(d)(5), was incorrect in limiting the Act's applicability only to situations where the plaintiff has "no knowledge of a federal presence".

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Petitioners, **JOHN H. CARNEY & JAMES R. FISHER,** respectfully request that a writ of *certiorari* be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's dismissal of certain of Petitioners' claims under Rule 12, F.R.Civ.P., and the summary judgment granted in favor of some defendants.

OPINIONS BELOW

On May 9, 2006, the Court of Appeals affirmed (App. 1a) the final judgment of the United States District Court for the Northern District of Texas, Dallas Division (App.78a). A petition for rehearing and rehearing *en banc* was denied on June 8, 2006 (App. 79a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254. The Court of Appeals had jurisdiction under 28 U.S.C. §1291, because this was an appeal from a final judgment of the United States District Court for the Northern District of Texas, Dallas Division. The United States District Court for the Northern District of Texas is within the Fifth Circuit. The United States District Court for the Northern District of Texas had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. §§ 1346(b), 2671 *et seq.*, and with respect to the state law claims asserted therein, under 28 U.S.C. § 1367.

RELEVANT PROVISIONS INVOLVED

U.S. Const. Amendment V:

"No person shall ... be deprived of life, liberty, or property, without due process of law; ...."

28 U.S.C. § 2679(d)(5):

"Whenever an action or proceeding in which the United States is substituted as a party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed timely presented if (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and (B) the claim is presented to the appropriate federal agency within 60 days after dismissal of the civil action."

28 U.S.C. § 1331(a):

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

STATEMENT

In 1995, Petitioners were convicted in a Dallas, Texas, federal district court of several offenses, including bank fraud, mail fraud, wire fraud, conspiracy, and making false statements to government agencies. Petitioners were sentenced to 87 months' confinement, and were incarcerated pending appeal for approximately 13 months. On appeal, the Fifth Circuit

reversed[1] holding, *inter alia*, that the government had withheld *Brady* and *Giglio* information from the defense in the first trial.[2] On remand, Petitioners were acquitted on all counts of the indictment.

Petitioners brought a *Bivens*-type[3] suit for damages against the federal investigative officers (FBI Agents and OTS Officers), who participated in the Joint Task Force investigation that led to Petitioners' indictments. Petitioners alleged that the investigative officers were civilly liable for damages resulting from the withholding of *Brady*[4] and *Giglio*[5] material in Petitioners' first trial, and for standing silent while perjured testimony from a key government witness was knowingly presented before the first trial jury. Petitioners also sued for various state law tort claims.

The federal district court granted summary judgment in favor of the government agents on the basis that the mandates of *Brady, Giglio* and *Napue*[6] extend only to prosecutors, who are absolutely immune from civil damage actions. The agents claimed, and Petitioners disputed, that they had turned over all of their investigative materials to prosecutors before the first trial, and that they had no duties under the due process clause of the Fifth Amendment to comply with the dictates of *Brady, Giglio* and *Napue*. The decision of the district court was based largely on the Fifth Circuit decision of *Mowbray v. United States*, 274 F.3d 269, 278 (5th Cir. 2001)(wherein: "*Brady* imposes a duty

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[1] *United States v. Fisher* 106 F.3d 622, 634-635 (5th Cir. 1997).
[2] *Id.* at 634-635.
[3] *Bivens v. Six Unknown Named Agents Of Federal Bureau Of Narcotics*, 403 U.S. 388 (1971).
[4] *Brady v. Maryland*, 373 U.S. 83 (1963).
[5] *Giglio v. United States*, 405 U.S. 150 (1972).
[6] *Napue v. Illinois*, 360 U.S. 264 (1959).

on prosecutors to share exculpatory evidence with the defense. Mowbray cites, and our research reveals, no case extending *Brady* to police officers or lab technicians. Accordingly, Mowbray has failed to allege an actionable claim against Hesskew or Robertson."). (App. 26a, *et. seq.*).

The district court dismissed Petitioners' Federal Tort Claim Act claims under 28 U.S.C. § 2679(d)(5), ruling that the savings clause provisions of the Act did not apply. App. 43a, 60a-62a).

The district court also dismissed Petitioners' State Law tort claims against the United States under Rule 12, F.R.Civ.P., holding that the applicable statute of limitations had run on such claims. App. 43a, 57a.

The Fifth Circuit affirmed the judgment of the district court in a *per curiam* opinion which recited:

> "Before JONES, Chief Judge, and BARKSDALE and BENAVIDES, Circuit Judges. PER CURIAM:
>
> > This court, having carefully reviewed the parties' briefs and pertinent portions of the record in light of the parties' oral arguments, concludes there is no reversible error in the district court's essential findings of fact and conclusions of law. We therefore AFFIRM the final judgment of the district court essentially for the reasons stated in its controlling opinions."

App. 1a.

A. Summary Judgment for Individual Defendants

In the district court, the FBI defendants (Vincent Fazzio & Jennifer Gant), and the OTS Defendants (Fred Teed, Rolf D. Coburn Aka Rolf Nordstrom, Karen Bruton, Ken Klein, Richard Riccabono, Brad Lambert) filed motions for summary judgment on Petitioners' *Bivens* claim that the defendants clearly violated Petitioners' constitutional right to due process of law by deliberately withholding *Brady/Giglio* material from Petitioners' prior to, during and Petitioners' first federal criminal trial; and that the defendants conducted a bad faith investigation[7] culminating in a prosecution that resulted in violations of the Petitioners' Fourth and Fifth Amendment rights to be secure in their persons, and to be free from unreasonable searches and seizures, and due process of law by eliciting false evidence and deliberately concealing exculpatory evidence from Petitioners at their first criminal trial. Petitioners submitted substantial summary judgment evidence in opposition to the motions and objected to the conclusory defense affidavits.

1. Agents; Summary Judgment Evidence.

(a) FBI Agents.

FBI agents Fazzio and Gant gave identical affidavits in support of their summary judgment

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[7] *Shaw v. Garrison*, 467 F.2d 113, 120 (5th Cir.), *cert. den.* 93 S.Ct. 467 (1967)("...there is a federal right to be free from bad faith prosecutions.")

motion, which stated, in relevant part:

> I did not make or participate in the decisions; whether to investigate or prosecute John H. Carney and James R. Fisher in the Criminal Case; what witnesses to call either at trial or before the grand jury or what testimony to elicit or evidence to introduce; whether any witness would be granted immunity, or what documents, evidence, or other materials would be turned over to Messrs. Carney and Fisher. Such decisions were made exclusively by the prosecutors and/or their supervisors in the case.
>
> Prior to the first trial of the Criminal Case, Ms. Gant and I turned over to the prosecutors the complete file, including all documents and evidence. I do not recall whether any additional materials were provided to the prosecutors prior to the second trial in the Criminal Case. I did not withhold any documents from production to the prosecutors and furnished them documents contemporaneously upon receipt.
>
> Further, I gave to the prosecutors all documents Plaintiffs allege should have been produced to them I did not withhold from the prosecutors any documents, and it was not my responsibility or duty to produce any documents to Messrs. Carney and Fisher.
>
> All materials produced to the Plaintiffs were chosen by, and provided to them, by the prosecutors. I did not participate in any discussion or decision concerning what materials

would be turned over to Messrs. Carney and Fisher. The prosecutors did not advise me what materials were provided to Messrs. Carney and Fisher.

(ii) OTS Defendants.

The OTS defendants (Bruton, Klein, Riccabono, Nordstrom and Teed) each filed summary judgment affidavits in support of their motion for summary judgment which essentially stated that the United States Department of Justice is by statute the entity that was responsible for handling the criminal prosecution of Messrs. Carney and Fisher, and that they had no involvement in the criminal prosecution or investigation of Messrs. Carney and Fisher. The OTS defendants opined that no materials were withheld from production to the Federal Bureau of investigation or the Department of Justice and they did not participate in any discussions or decisions about what documents were to be released to Messrs. Carney and Fisher. The OTS Defendants denied any responsibility or duty in connection with the criminal prosecution to produce any documents to Messrs. Carney and Fisher. And, the affidavits contained the disclaimer that the affiants believed it was consistent with clearly established law and objectively reasonable under the circumstances for them to rely upon the prosecutors to make all decisions in connection with the criminal case.

(iii) Petitioners' Summary Judgment Evidence in opposition.

Petitioners' summary judgment evidence showed[8] that shortly after Petitioners acquired Bayside Savings and Loan, in 1989, Congress passed the Financial Institution Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. 101-73, 103 Stat. 183. FIRREA eliminated the regulatory goodwill offered by regulators as an incentive to purchase S&Ls. This severely restricted the amount of capital available in S&Ls using regulatory goodwill, and also limited the size of the S&Ls since their ability to lend was contingent on their capital reserves. Bayside had used much of its original cash investment to pay off Bayside's debts to federal regulators, and had relied on the goodwill to support its capital base until the institution had recouped some of its losses. Bayside's capital base was reduced by FIRREA from close to $4,000,000 to around $800,000.

In June, 1990, Petitioners sued the United States for breach of contract.[9]

On July 17, 1990, Michael Tannery requested a loan from Bayside purportedly on behalf of Bradley Branson. [Exhibit 2]. The loan request was granted on August 22, 1990 [Exhibit 3], and the loan was to mature on February 25, 1991.

On July 31, 1990, OTS Defendant Fred Teed began an investigation into Petitioners and Bayside,

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[8] References are to Petitioners' Joint Appendix (Volumes I & II) in opposition to Defendants' Motions for Summary Judgment, and to *United States v. Fisher* 106 F.3d 622, 634-635 (5th Cir. 1997).

[9] *See United States v. Fisher*, 106 F.3d at 626. *See also United States v. Winstar Corp.*, 518 U.S. 839 (1996)

and sent a memo to OTS investigators that said "I bet Rolf [Nordstrom] could dig up some dirt on an exam." [Exhibit 26]. Thus began the OTS investigation, later acting in conjunction with the FBI, that ultimately led to the indictment of Petitioners.

On February 25, 1991, the "Branson loan" matured, and a criminal referral was made by Bayside, suspecting forgery by Michael Tannery on the Branson loan documents. Thus began the FBI investigation. The summary judgment evidence showed that the OTS and the FBI were conducting a joint investigation into the Branson loan, which later expanded in focus on Petitioners, and their conduct surrounding the acquisition of Bayside.

In March and August 1992, the FBI and the OTS conducted interviews with Michael Jaccar, Bradley Branson's power of attorney, about the loan transaction. [Exhibits 9 & 108]. The FBI and OTS defendants were fully advised that Bradley Branson knew nothing about the loan, and that Tannery was not authorized to make the loan on Branson's behalf. In fact, the FBI and OTS investigators discovered that the power of attorney allegedly possessed by Tannery from Branson was a forgery. In November, 1992, the FBI confirmed Jaccar's information through interviews with Bradley Branson himself. [Exhibit 12]. In April 2003, Jaccar gave an affidavit to the OTS confirming the facts. [Exhibit 16].

In the meantime, the joint FBI and OTS investigation into Petitioners' activities expanded into other areas surrounding the acquisition of Bayside, and its operation after acquisition.

On February 19, 1993, Michael Tannery was granted immunity from prosecution concerning the Branson/Bayside loan [Exhibit 14], and in February,

1994, Tannery offered testimony before a federal grand jury that Branson knew about the loan and authorized it [Exhibit 55].

Petitioners were indicted on March 17, 2004, as a result of the joint FBI and OTS investigation. Count 10 of the indictment was a bank fraud count involving the Branson loan. [Exhibit 63].

Before trial, Petitioners' had jointly requested *Brady* material from the government. In response to this Motion, on July 29, 2004, federal prosecutors Richard Weidis and Pamela Dempsey, represented [Exhibit 19] to the federal district court that:

> "The government is unaware of any *Brady* material at this time . . . The government is aware of its continuing responsibilities pursuant to this line of cases and should any material come into the possession of the government they will be provided [it] at that time".

At trial, Tannery once again testified that Bradley Branson was aware of the Bayside loan and that he authorized it. FBI agents Fazzio and Gant sat by during Tannery's trial testimony, knowing full well from their personal investigation that Tannery was perjuring himself about the Branson loan. After Tannery testified before the trail jury, on March 20, 1995, Petitioners filed a "Specific Motion with memorandum for *Brady/Giglio* material [Exhibit 18] relating to government witness Michael Tannery" for any evidence that: Tannery was the lawful attorney in fact under a lawfully executed power of attorney for Branson and whether the power of attorney was a forgery. Petitioners requested all testimony of Michael Jaccar, the existence of FBI 302's concerning the

execution or non-execution of any power of attorney, and any evidence that Tannery has ever made a false statement under oath or penalty of perjury. Nothing was produced, except for the Bradley Branson 302, that ultimately resulted in the reversal of Petitioners' convictions. Only in discovery in this action did Petitioners uncover the reams of existing, but undisclosed, *Brady* materials.

B. Disposition of the Case – Summary Judgment

The United States Magistrate Judge recommended[10] that summary judgment be granted on Petitioners' *Bivens* claims, grounded in *Brady/Giglio* and *Napue* violations, finding that the individual defendants did not violate Petitioners' constitutional rights, relying heavily on the panel opinion in *Mowbray v. United States*, 274 F.3d 269, 278 (5th Cir. 2001)(wherein: "*Brady* imposes a duty on prosecutors to share exculpatory evidence with the defense. Mowbray cites, and our research reveals, no case extending *Brady* to police officers or lab technicians. Accordingly, Mowbray has failed to allege an actionable claim against Hesskew or Robertson."). Petitioners filed their objections to the findings and recommendations of the Magistrate Judge. The district court overruled Petitioners' objections, adopted the findings and conclusions of the Magistrate Judge, and entered an order sustaining all defendants' motions for summary judgment. App. 3a.

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[10] See App. 7a.

C. Disposition of the Case – Rule 12 dismissal.

The district court also dismissed Petitioners' state law tort claims on limitations grounds, holding that the Westfall Act's savings provision did not apply to the instant case. App. 43a.

The appeal followed. A panel of the Fifth Circuit, consisting of Jones, Chief Judge, and Barksdale and Benavides, Circuit Judges affirmed the judgment of the district court in all respects in a *per curiam* order dated May 9, 2006. App.1a. A timely filed Motion for rehearing *en banc* was denied June 8th, 2006. App.79a.

REASONS FOR GRANTING THE PETITION

There are special and important reasons for granting the writ of *certiorari* in this case. The questions presented by Petitioners herein demonstrate that the United States court of appeals for the Fifth Circuit has:

1. So far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Rule 10(a), Supreme Court Rules.
2. Decided important questions of federal law that have not been, but should be, settled by this Court. Rule 10(c), Supreme Court Rules.
3. Entered a decision in conflict with the decision of another United States court of appeals on the same important matter. Rule 10(a), Supreme Court Rules.
4. Decided an important federal question in a way that conflicts with relevant decisions of

this Court. Rule 10(c), Supreme Court Rules.

5. Entered a decision ruling on the application of the Westfall Act that could have a number of untoward effects. It could occasion appellate affirmation of incorrect legal results. The rule announced by the Fifth Circuit regarding "knowledge of a federal presence" does not aid determination of the application of 28 U.S.C. § 2679(d)(5) because its operation is unpredictable in advance of the district court's adjudication and is contrary to the clear statutory intent.

A. Appellate Standard of Review – Summary Judgment and Rule 12 dismissal.

The Fifth Circuit Court of Appeals decision reveals that the Court did not conduct a *de novo* review of the trial court's award of summary judgment granting qualified immunity, as required under Fed.Rules Civ.Proc.Rule 56(c). The decision also reveals that a *de novo* review was not performed as to the dismissal of Petitioners' claims under the Westfall Act.

Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of "legal facts." See *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S., 800. That question of law, like the generality of such questions, must be resolved *de novo* on appeal. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 558 (1988). A court engaging in review of a qualified immunity judgment should

conduct de novo review and use its "full knowledge of its own [and other relevant] precedents." *See Davis*, 468 U.S. 183, at 192. *Elder v. Holloway* 510 U.S. 510 (1994).

The Fifth Circuit's decision stated summarily that:

> "This court, having carefully reviewed the parties' briefs and pertinent portions of the record in light of the parties' oral arguments, concludes there is no reversible error in the district court's essential findings of fact and conclusions of law. We therefore AFFIRM the final judgment of the district court essentially for the reasons stated in its controlling opinions."

A district court's grant of summary judgment and qualified immunity rulings are reviewed *de novo.* Fed.Rules Civ.Proc.Rule 56(c). To determine on a motion for summary judgment whether police officers are entitled to qualified immunity, the Court of Appeals must *de novo* engage in a two-part analysis, determining whether, viewing the facts in the light most favorable to the plaintiff, the officers' conduct violated a constitutional right, and, if it did, determining if such right was clearly established. *Elder v. Holloway* 510 U.S. 510 (1994).

Summary judgment is reviewed de novo. *Thompson v. Upshur County, TX* 245 F.3d 447 C.A.5 (Tex.), 2001. The appellate court's failed to review the grant of summary judgment on appeal by the same standard used by the trial court under Fed.R.Civ.P. 56(c). *See Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir.1986). The court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material

fact and whether the district court correctly applied the relevant substantive law. *Blackwell v. Barton*, 34 F.3d 298, 301 (5th Cir.1994).

Summary judgment was inappropriate since Petitioner's summary judgment evidence created genuine issues of material fact and the defendants were not entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A factual dispute that might affect the outcome under governing law precludes the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When reviewing a motion for summary judgment, a court must evaluate the facts in a light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Id.* at 255. The mere existence of a scintilla of evidence in support of the nonmovant's position will be insufficient; there must be evidence on which the jury could reasonably find for the nonmovant. *Anderson*, 477 U.S. at 252.

Whether an asserted federal right was clearly established at particular time, so that a public official who allegedly violated that right has no qualified immunity from suit, presents question of law, not one of legal facts, and that question of law must be resolved de novo on appeal. *Elder v. Holloway* 510 U.S. 510 (1994). Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of "legal facts." See *Mitchell v. Forsyth*, 472 U.S. 511, 528, (1985); *Harlow v. Fitzgerald*, 457 U.S., at 818. That question of law, like the generality of such questions, must be resolved *de novo* on appeal. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

The court of appeals below failed to conduct a *de*

novo review and deferred to the trial courts ruling. When *de novo* review of district court opinion is compelled, no form of appellate deference is acceptable. *Salve Regina College v. Russell*, 111 S.Ct. 1217 (1991).

B. *Bivens* Claims Against Federal Agents for *Brady* violations.

The constitutional right to be vindicated by this *Bivens'* action is the "fair trial" right not to be convicted through the use of evidence falsified by the government (*see, e.g., Napue v. Illinois*, 360 U.S. 264 (1959)), and the fair trial right not to be deprived of exculpatory/impeachment evidence, as recognized in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) (*Brady* duty to disclose evidence undermining a government witness' credibility). Petitioners alleged that the FBI and OTS defendants violated their federal constitutional rights by falsifying evidence against them and by failing to disclose information of which they were aware showing that the account of the government's key witnesses, Tannery, was not only false, but in fact in direct conflict with their own investigation into the Tannery/Branson loan.

In addition, the decision of the Court of Appeals in this case demonstrates a conflict in the Circuits regarding agent liability for *Brady* and *Napue* violations.

1. *Mowbray.*

In *Mowbray v. Cameron County*, 274 F.3d 269, 278 (5th Cir. 2001)[decided December 6, 2001), a §1983

case against state officers, in which the Court opined that "*Brady* imposes a duty on prosecutors to share exculpatory evidence with the defense. *Mowbray* cites, and our research reveals, no case extending *Brady* to police officers or lab technicians. Accordingly, *Mowbray* has failed to allege an actionable claim against Hesskew or Robertson."

As to Petitioners' *Brady/Giglio* and *Napue* claims, the thrust of the Magistrate's findings and recommendations was that the defendants had no duty to provide the Petitioners with exculpatory or impeaching evidence since that was the duty of the prosecutor's alone under *Brady* and its progeny. Thus, the Magistrate concluded, Petitioners had not shown that the individual defendants personally denied Petitioners' constitutional rights. App. 38a. The Magistrate reasoned that since the defendant investigators had opined that they had turned over all information to the prosecutors, they were relieved of any responsibility to insure that the Petitioners' received a fair trial under due process of law. The Magistrate further reasoned that the defendants had no duty under *Napue* to correct false testimony and evidence once presented to the first trial jury, and beside that, the evidence withheld was merely contradictory and did not prove perjury. The Magistrate, and hence the district court, and the panel of the Fifth Circuit, in affirming the magistrate's findings and conclusions of law, relied heavily on the panel decision of the Fifth Circuit in *Mowbray*, and it is the apparent holding in *Mowbray*, and its application to this case, that Petitioners ask this Court to review upon a grant of a writ of *certiorari*.

2. Conflict with this Court and other Circuits.

With all due respect to the panel in *Mowbray*, the Fifth Circuit apparently overlooked this Court's decision of *Kyles v. Whitley*, 514 U.S. 419, 438-40 (1995) (disclosure obligations under *Brady* apply to police officers even when the police never gave the information to the prosecutor). Indeed, because prosecutors cannot comply with *Brady* without the cooperation of police, it has long been accepted (and certainly before the *Mowbray* decision) that criminal defendants have a right to *Brady* materials possessed by only the police but not the prosecutor. *E.g.*, *United States ex rel Smith v. Fairman*, 769 F.2d 386, 391-93 (7th Cir. 1985) ("We believe that the purposes of *Brady* would not be served by allowing material exculpatory evidence to be withheld simply because the police, rather than the prosecutors, are responsible for the nondisclosure"), citing *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 844, 846 (4th Cir. 1964) ("[I]t makes no difference if the withholding [of exculpatory evidence] is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, [police] officers are practicing deception not only on the State's Attorney but on the court and the defendant"); *Jones v. Chicago*, 856 F.2d 985, 995 (7th Cir. 1988)(recognizing duty); *Clarke v. Burke*, 440 F.2d 853, 855 (7th Cir. 1971) ("knowledge of the police is knowledge of the prosecutor...").

On the basis of several of the foregoing precedents, Judge Easterbrook put this issue to rest in

the 7th Circuit in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001)[decided July 11, 2001], holding definitively that the law as to police and *Brady* was clearly established by 1980. *Newsome*, 256 F.2d at 752. Moreover, Chicago's petition for rehearing in *Newsome* on this very same issue was denied anew. *See Newsome II*, 260 F.3d 824 (7th Cir. 2001)[August 14, 2001] *(per curium)* (also denying petition for rehearing *en banc*). *See also Manning v. Miller*, 355 F.3d 1028, 1034 (7th Cir. 2004).[11]

3. "No duty"?

The FBI Defendants (Special Agents Fazzio & Gant) essentially avoid the aggregate claims of due process rights violations, which resulted in the denial of a fair trial and deprivation of liberty of Petitioners, and argue that as a matter of law, they "had no duty to provide Petitioners with exculpatory material under *Brady*. That duty rests solely with the prosecutors." (Fazzio & Gant Br. at 8). They argued that they "did not withhold or conceal any materials at issue from the

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[11] "Buchan and Miller also argue that *Brady* should not be extended to cover the actions of police or investigators, but rather, only prosecutors. This assertion, while eloquently argued, is flatly contradicted by existing case law. In *Kyles v. Whitley*, the Supreme Court found that the *Brady* duty of turning over exculpatory evidence includes not only the prosecutor, but the investigating officers as well. 514 U.S. 419, 438 (1995). Similarly, although previously established in the Seventh Circuit, our recent *Newsome* decision reiterates the same rule. *Newsome v. McCabe*, 260 F.3d 824, 824 (7th Cir.2001) (noting, "police who deliberately withhold exculpatory evidence, and thus prevent the prosecutors from complying with the obligations articulated in *Brady*, violate the due process clause.").

prosecutors, and it was objectively reasonable for them to rely on the prosecutors to produce exculpatory material to Petitioners." (*Id.* at 8-9).

The OTS Defendants (Fred Teed, Rolf D. Coburn aka Rolf Nordstrom, Karen Bruton, Ken Klein, Richard Riccabono, Brad Lambert have made essentially the same argument. "As is clear from the record in the case, the prosecutors alone had authority to make the prosecutorial decisions — and they alone made them — that undergird Petitioners' claims." (OTS Def. Br. at 12).

Petitioners maintain that these federal, sworn officers have affirmative duties to support and defend the United States Constitution, and that they may not escape liability by attempting to set up a wall between them and the prosecutors, when the undisputed summary judgment evidence demonstrates that they were all part of the prosecution team. While the individual FBI and OTS defendants maintain that they had no duty to turn over exculpatory evidence to the defense at trial of a criminal case, with which argument the Magistrate, the district court, and the Panel of the Court of Appeals apparently agreed, it should be the law of the land that these defendants, and those similarly situated, do have an affirmative duty not to suppress exculpatory evidence, from prosecutors, and from the defense, along with the affirmative duty to insure that their conduct or inaction does not deprive the citizen accused of criminal conduct of a fair trial, *i.e.* by allowing false testimony, knowing of its falsity, to go uncorrected when the prosecution team has direct evidence demonstrating the falsity of the testimony in their possession. *See Geter v. Fortenberry*, 849 F.2d 1550, 1558 (5th Cir.1988) (concluding such allegations defeat a police officer's qualified immunity under §

1983).

4. Officers who deliberately withhold or suppress Brady materials violate the due process clause. [12]

In constitutional-tort cases, as in other cases, "a man [is] responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961). This principle led this Court in *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), to hold that the issuance of an arrest warrant will not shield the police officer who applied for the warrant from liability for false arrest if "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345, 106 S.Ct. at 1098 (footnote omitted). The Court was speaking of immunity, but its discussion is equally relevant to causation, as indeed is implied in a footnote to the Court's opinion. See *id.* at 344 n. 7, 106 S.Ct. at 1098 n. 7. By parallel reasoning, a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial- none of these decisions will shield a police officer that deliberately supplied misleading information that influenced the decision. See, e.g., *Myers v. Morris*, 810 F.2d 1437, 1457 (8th Cir.1987); *Smiddy v. Varney*, 665 F.2d 261, 266-67 (9th Cir.1981); *Ames v. United States*, 600 F.2d 183, 185 (8th Cir.1979).

And, it is true that at some point after a person

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[12] *See Jean v. Collins*, 221 F.3d 656 (4th Cir.2000) (en banc) (all 12 judges concluded that police who deliberately withhold exculpatory evidence, and thus prevent the prosecutors from complying with *Brady*, violate the due process clause).

is arrested, the question whether his continued confinement or prosecution is unconstitutional passes over from the Fourth Amendment to the due-process clause (and after conviction to the Eighth Amendment's cruel and unusual punishments clause). See *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir.1973) (Friendly, J.); *Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir.1987); cf. *Justice v. Dennis*, 834 F.2d 380, 382 (4th Cir.1987) (en banc); *Williams v. Mussomelli*, 722 F.2d 1130, 1133 (3d Cir.1983). But the causal inquiry is unchanged. If police officers have been instrumental in the Petitioner's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials with whom they have dealt in the investigation and prosecution of the case. *See e.g. Jones v. Chicago*, 856 F.2d 985 (7th Cir.1988).

In this case, both the FBI defendants and the OTS defendants seem to argue that because injury depended on the actions of the prosecutor, they either are not substantively liable or they possess a derivative form of immunity.[13] But the real issue before this Court

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[13] *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir.1994), provides the principal support for this contention. It holds that responsibility rests on the prosecutor, rather than the police, when there would have been no injury but for a prosecutorial decision that is protected by absolute immunity. *Buckley* finds company in *Michaels v. McGrath*, 222 F.3d 118 (3d Cir.2000), but two circuits have reached contrary conclusions. See *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir.2000); *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir.1997). One Justice has expressed the view that *Buckley* was decided incorrectly. See *Michaels v. McGrath*, 531 U.S. 1118, 121 S.Ct. 873, 148 L.Ed.2d 780 (2001) (Thomas, J., dissenting from the denial of certiorari).

does not present the *Buckley* issue, for a fundamental reason: the OTS and FBI defendants' affidavits and deposition testimony offer nothing more the mere conclusory allegations that they turned everything over to the prosecutors, a fact which is readily disputed by the trial prosecutors' judicial representations to the Court, at least as to the identified *Brady/Giglio* materials. *Buckley* supposed that the police had been forthcoming with the prosecutors, so that injury really could be traced to prosecutorial decisions. The FBI and OTS defendants have maintained that their self-serving affidavits and testimony as "uncontroverted facts", when two critical witnesses, the trial prosecutors have not been brought forward by the defendants to support such claims.

The principle advanced herein by Petitioners is that government sworn officials do have an affirmative duty not to suppress materials favorable to the defense, whether or not they do not have a duty to physically turn such materials over to the defense, or make the decisions as to what materials to turn over. This is mandated by their constitutional oath.[14] As United States Magistrate Jane Boyle[15] stated in an earlier part

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[14] In *Jones*, the police had fabricated some evidence and concealed much exculpatory information. The Seventh Circuit said: "If officers are not candid with prosecutors, then the prosecutors' decisions--although vital to the causal chain in a but-for sense--are not the important locus of action. Pressure must be brought to bear elsewhere. Prosecutors kept in the dark by the police (and not negligent in failing to hire other persons to investigate the police) won't improve their performance with or without legal liability for their conduct. Requiring culpable officers to pay damages to the victims of their actions, however, holds out promise of both deterring and remediating violations of the Constitution." *See Jones v. Chicago*, 856 F.2d 985 (7th Cir.1988)

[15] Now a federal district judge in the Northern District of Texas.

of the proceedings in the district court:

> "[B]y having knowledge of, consenting to, and participating in an extra judicial conspiracy among DOJ agents, OTS agents, and Government witnesses to allow the use of false and misleading testimony and to withhold exculpatory evidence at trial"; by failing "to establish adequate training procedures regarding the defendants' *Brady* responsibilities for the OTS employees under their supervision"; by supervising "OTS agents in a coordinated investigative effort outside the proper scope of the routine OTS examination process, in violation of their [Petitioners'] Fifth Amendment rights to due process"; "No OTS agent or federal agent in general could view participating in a conspiracy to withhold exculpatory evidence to allow the use of false testimony as objectively reasonable."

See "Hearing on Motion to Dismiss Before Hon Jane J. Boyle, U.S. Magistrate Judge" on September 12, 2000, pp. 92 – 103.

5. Review by this Court

Petitioners' Questions should be reviewed by this Court in order to resolve an apparent conflict of Circuits on the issue. Review is warranted because it is only this Court that can correct the decision in *Mowbray*. The Panel opinion in *Mowbray* seems to announce a black-letter rule of law, upon which the defendants and the Magistrate seized in the summary judgment proceedings. *Mowbray* overlooks the holding

of this Court in *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), and its own circuit's opinion in *Geter v. Fortenberry*, 849 F.2d 1550, 1559 (5th Cir. 1988).

The Court should review this case to resolve the conflict of the Circuits, particularly the 7th Circuit, on the issue of whether the *Brady* and *Napue* obligations extend beyond the immunized conduct of the prosecutors, to the members of the prosecution team who have intimate knowledge of the facts. It is only by this reasoning that there exists a constitutional remedy to enforce the criminal defendants' due process rights to a fair trial free of suppressed *Brady* material and untainted by the knowing use of perjured testimony. The question is of exceptional importance as to the spirit of the holding in *Bivens* recognizing this type of damage action as essential to protecting Fourth and Fifth Amendment interests.

C. Westfall Act

28 U.S.C. § 2679(d)(5), provides, in pertinent part: Whenever an action or proceeding in which the United States is substituted as a party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed timely presented if (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and (B) the claim is presented to the appropriate federal agency within 60 days after dismissal of the civil action.

The district court found at (App. 59a), and the Court of Appeals affirmed, that the statute of limitations did not begin to run until Petitioners were acquitted (October 3, 1997), and that the original

complaint filed September 3, 1999 was timely filed. The court entered its order adopting the Findings, Conclusions and Recommendations of the Magistrate Judge made on January 8th, 2001, which in part found that based upon the certification of the Attorney General, each of the individual defendants were acting in the course and scope of their employment. The individual defendants were dismissed from the suit and substituted by the USA as to the common law tort claims.

On December 20th, 2000, Petitioners submitted FTCA demands to the agency employers of the individual defendants. (App. 54a) On the expiration of 6 months without response to the FTCA complaints, Petitioners filed an amended pleading asserting the common law tort claims against the USA. Petitioners therefore complied with the requirements of Section 2679(d)(5).

Section 2679(d)(5) does not apply unless the United States has been substituted as a defendant under subsection (d) of 28 U.S.C. § 2679. Certification was made as to each individual defendant. The basis of the substitution is a certification by the certification by the Attorney General that the individual defendants were federal employees acting within scope of his office or employment. *Filaski v. U.S.* 776 F.Supp. 115 (E.D.N.Y. 1991). The effect of certification is to substitute the United States as defendant on certified claims and protect the individual from liability as to such claims.

The trial court granted defendants motion to dismiss on the grounds that Section 2679(d)(5) did not apply where plaintiff had knowledge of a federal presence. There is no language in statute suggests the narrow application of Section 2679(d)(5), given by the

district court, limiting it to situations where the plaintiff has "no knowledge of a federal presence". (App. 61a). There is no authority cited by the district court that supports the proposition that the savings clause does not "save claims originally brought against the United States or a known federal opposition". (7R.1530)

Nothing in the legislative history of the statute suggests such a limited reading. Even if complaining of known federal employees, a plaintiff is not required to presume that the defendants were acting in the course and scope of their office or employment when committing common law torts. Under the Westfall Act, a plaintiff cannot contest a United States Attorney's refusal to certify that an employee of the federal government was acting within the scope of his employment at the time he engaged in the tortious conduct, yet is presumptively bound by the decision if the certification is made. *Booten v. U.S.* 233 F.Supp.2d 227 (D.Mass., 2002). The United States Attorney may make certifications as to some defendants, and exclude others; *Woods v. McGuire*, 954 F.2d 388, 391 (6th Cir.1992). The application of the Federal Tort Claim Act savings clause Section 2679(d)(5) is not predicated upon such vagaries.

Because Petitioners timely complied with the Act's requirements, the district court's dismissal was clear error.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner prays that the Petition for Writ of *Certiorari* be granted and that upon

full consideration the Court reverse the decision of the United States Court of Appeals for the Fifth Circuit, and remand the case to the Court of Appeals with instructions.

Respectfully submitted,

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No. 05-10198

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN H. CARNEY; JAMES R. FISHER,
Plaintiffs-Appellants,

Versus

UNITED STATES OF AMERICA; ET AL.,
Defendants,

UNITED STATES OF AMERICA; OFFICE OF THRIFT SUPERVISION; FEDERAL BUREAU OF INVESTIGATION, One or more unknown officials of the Department of Justice, Federal Bureau of Investigation; FRED TEED; ROLF D. COBURN, also known as Rolf Nordstrom; KAREN BRUTON; KEN KLEIN; RICHARD RICCABONO; VINCENT G. FAZZIO; JENNIFER GANT; BRAD LAMBERT; RICHARD H. KAMP; PAMELA I. DEMPSEY; JACK HINTON; EDWARD KRAMER,
Defendants-Appellees.

May 9, 2006, Filed

NOTICE: RULES OF THE FIFTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

JUDGES: Before JONES, Chief Judge, and BARKSDALE and BENAVIDES, Circuit Judges.

OPINION: PER CURIAM:*

This court, having carefully reviewed the parties' briefs and pertinent portions of the record in light of the parties' oral arguments, concludes there is no reversible error in the district court's essential findings of fact and conclusions of law. We therefore AFFIRM the final judgment of the district court essentially for the reasons stated in its controlling opinions.

AFFIRMED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Civil Action No. 3:99-CV-1989-M

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

JOHN H. CARNEY,
Plaintiffs,

v.

USA, et al., Defendants.

September 30, 2004, Decided
September 30, 2004, Filed

JUDGES: BARBARA M. G. LYNN, UNITED STATES DISTRICT JUDGE.

OPINIONBY: BARBARA M. G. LYNN

OPINION:

ORDER ON FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Court has under consideration the Findings, Conclusions and Recommendation of United States Magistrate Judge Irma Ramirez on the Motion for Summary Judgment of Defendants Karen Bruton, Kenneth Klein, Bradford Lambert, Rolf Nordstrom, Richard Riccobono and Frederick Teed and the Motion for Summary Judgment of Defendants Vincent G. Fazzio and Jennifer Gant, both filed November 17, 2003. Objections were filed, and the District Court has made

a *de novo* review of those portions of the proposed Findings, Conclusions and Recommendation to which objection was made. Except to the limited extent stated below, the objections are overruled, and the Court accepts the Findings, Conclusions and Recommendation of the United States Magistrate Judge.

Magistrate Judge Ramirez refers to Plaintiffs' allegations of "respondeat superior" liability, but Plaintiffs claim they have only asserted a claim of "supervisory liability." Magistrate Judge Ramirez also refers to Plaintiffs' "prosecution team" argument, describing it as a claim of group liability. These distinctions [*4] are without a difference, and this Court finds the analysis of the Magistrate Judge with respect to these issues is correct.

Defendant Fazzio has objected to the Magistrate Judge's ruling on a claim of subornation of perjury against Fazzio. This objection is sustained, because although the Third Amended Complaint is hard to decipher with respect to what claims are asserted against whom, the Court finds that no claim of subornation of perjury was asserted against Fazzio. *See* Pl. Third Am. Compl. at 71-73. Therefore, the contention is moot that the Magistrate Judge, *sua sponte*, recommended that this Court grant summary judgment on a subornation of perjury claim against Fazzio, without Plaintiffs having been given ten days notice under *Rule 56*. Finally, Plaintiffs complain that the Magistrate Judge did not expressly rule upon Plaintiffs' objections to the affidavits of the OTS Defendants and the FBI Agent Defendants. To the extent those affidavits are improper, they are not being considered by the Court and presumably were not

considered by the Magistrate Judge; however, in any case, the Court finds the objections without merit and, therefore, those objections are overruled. [*5] The Court permits further briefing on one issue. The Magistrate Judge at page 14 of her fine opinion recommends summary judgment on Plaintiffs' malicious prosecution claim. In their objections, Plaintiffs refer to P 128 of their Third Amended Complaint, and object to the Magistrate Judge's *sua sponte* recommendations of summary judgment for the FBI Agent Defendants on this claim, asserting they did not receive ten days notice of the Magistrate Judge's intention.

The Court hereby gives Plaintiffs notice of its intent to grant summary judgment on the malicious prosecution claims of all remaining Defendants. Plaintiffs may respond by filing a brief on this limited subject on or before ten days from the date of this Order, and Defendants may answer the Plaintiffs' brief within ten days thereafter. No reply briefs will be permitted. As this Court reads *Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003) (en banc)*, the reference in P 128 of the Third Amended Complaint to Plaintiffs' post conviction incarceration does not satisfy *Castellano's* holding as to what is required to state a malicious prosecution claim based on constitutional violations.

Accordingly, [*6] the Motion for Summary for Summary Judgment of Defendants Karen Bruton, Kenneth Klein, Bradford Lambert, Rolf Nordstrom, Richard Riccobono and Frederick Teed is hereby **GRANTED** and the Motion for Summary Judgment of Defendants Vincent G. Fazzio and Jennifer Gant is hereby **GRANTED**, except for the claim of malicious prosecution asserted against all Defendants. As to that

claim, the Court denies summary judgment at this time, but will consider the issue anew, sua sponte, after the specified briefing is completed. The case is stayed for all other purposes.

SO ORDERED this 30th day of September, 2004.

BARBARA M. G. LYNN

UNITED STATES DISTRICT JUDGE

PARTIAL JUDGMENT

The Court has signed its Order accepting in all but limited respects the Findings, Conclusions and Recommendation of United States Magistrate Judge Irma Ramirez.

It is therefore **ORDERED, ADJUDGED and DECREED** that all claim in this action are **DISMISSED with prejudice**, except for Plaintiffs' malicious prosecution claims, which the Court will consider after further briefing, as ordered.

It is further **ORDERED** that the Clerk shall transmit a true copy of this Partial Judgment, [*7] together with a true copy of the Order On the Findings, Conclusions and Recommendation of the United States Magistrate Judge, to the parties.

SIGNED this 30th day of September, 2004.

BARBARA M. G. LYNN

UNITED STATES DISTRICT JUDGE

Civil Action No. 3:99-CV-1989-M

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

JOHN H. CARNEY, et al.,
Plaintiffs,

v.

USA, et al.,
Defendants.

June 9, 2004, Decided
June 9, 2004, Filed

JUDGES: IRMA CARRILLO RAMIREZ, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY: Irma C. Ramirez

OPINION:

FINDINGS, CONCLUSIONS, & RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the District Court's Standing Order of Reference, filed May 12, 2003, which referred this case to the undersigned United States Magistrate Judge for pretrial management and recommendation on dispositive motions, the Court has before it the following pleadings:

1. *Motion for Summary Judgment on Behalf of Karen Bruton, Kenneth Klein, Bradford Lambert, Rolf Nordstrom, Richard Riccobono and Frederick Teed,* filed November 17, 2003;

2. *Memorandum in Support of Motion for Summary Judgment on Behalf of Karen Bruton, Kenneth Klein, Bradford Lambert, Rolf Nordstrom, Richard Riccobono and Frederick Teed,* filed November 17, 2003;

3. *Appendix to Memorandum in Support of Motion for Summary Judgment on Behalf of Karen Bruton, Kenneth Klein, Bradford Lambert, Rolf Nordstrom, Richard Riccobono and Frederick Teed,* filed November 17, 2003;

4. *Plaintiffs' Response to Defendants Karen Bruton, Kenneth Klein, Bradford* [*3] *Lambert, Rolf Nordstrom, Richard Riccobono and Frederick Teed's Motion for Summary Judgment,* filed February 20, 2004;

5. *Plaintiffs' Brief in Support of Their Response and Opposition to Defendants' Motion for Summary Judgment,* filed February 20, 2004;

6. *Plaintiffs' Objections to the Affidavits of Defendants Karen Bruton, Kenneth Klein, Bradford Lambert, Rolf Nordstrom, Richard Riccobono and Frederick Teed in*

Support of Defendants [sic] *Motion for Summary Judgment*, filed February 20, 2004;

7. *Reply in Support of Motion for Summary Judgment on Behalf of Karen Bruton, Kenneth Klein, Bradford Lambert, Rolf Nordstrom, Richard Riccobono and Frederick Teed*, filed March 22, 2004;

8. *Motion for Summary Judgment of Defendants Vincent G. Fazzio and Jennifer Gant*, filed November 17, 2003;

9. *Brief in Support of Motion for Summary Judgment of Defendants Vincent G. Fazzio and Jennifer Gant*, filed November 17, 2003;

10. *Plaintiffs' Response to Defendants Fazzio & Gant's Motion for Summary Judgment*, filed February 20, 2004;

11. *Plaintiffs' Brief in Support of Their Response and Opposition to Defendants'* [sic] *Fazzio & Gant's* [*4] *Motion for Summary Judgment*, filed February 20, 2004;

12. *Plaintiff's Objections to the Affidavits of Defendants Fazzio & Gant in Support of Defendants* [sic] *Motion for Summary Judgment*, filed February 20, 2004;

13. *Reply Brief in Support of Motion for Summary Judgment of Defendants Vincent*

Fazzio and Jennifer Gant, filed March 22, 2004; and

14. *Objections to Plaintiffs' Summary Judgment Evidence of Defendants Vincent Fazzio and Jennifer Gant*, filed March 22, 2004.

Based on the pleadings, the evidence submitted therewith, and the applicable law, the Court is of the opinion that the *Motion for Summary Judgment of Defendants Vincent G. Fazzio and Jennifer Gant* should be **GRANTED**, the *Motion for Summary Judgment on Behalf of Karen Bruton, Kenneth Klein, Bradford Lambert, Rolf Nordstrom, Richard Riccobono and Frederick Teed* should be **GRANTED**, and this action should be **DISMISSED** with prejudice.

I. BACKGROUND

A. Facts

This is a *Bivens* n1 action against several federal employees in their individual capacities arising out of the March 22, 1995 convictions of John H. Carney and John R. Fisher ("Plaintiffs") [*5] for bank fraud, mail fraud, wire fraud, conspiracy, and making false statements to government officials. Their convictions were later reversed, giving rise to this action. n2

In the summer of 1987, Plaintiffs formed a corporation and bank holding company, United States Savings Associates ("USSA"), in order to purchase a foundering savings and loan institution in Port Charlotte, Florida, named Bayside Savings and Loan Association [*6] ("Bayside"). The purchase was approved by the Office of Thrift Supervision ("OTS"),

and Plaintiffs raised capital in part by offering repurchase agreements that allowed investors to purchase "units" in USSA. In return, Plaintiffs agreed to obtain refinancing of the investor's residential investments. If refinancing was not timely obtained, USSA was obligated to repurchase each investor's unit.

One investor, Bradley Branson ("Branson"), a professional basketball player living in Spain at the time, purchased two units through his accountant Michael Tannery ("Tannery"). Branson had allegedly granted Tannery full power of attorney, including the authority to enter into and manage his investments. Tannery invested in Bayside on Branson's behalf, but "overpaid" by mistakenly including an additional check for $ 20,000.

In 1989, Bayside began to suffer severe financial difficulties, due in part to the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). The FIRREA diminished Bayside's capital reserves from nearly $ 4,000,000 to approximately $ 800,000; Bayside's lending ability was correspondingly constrained. Some investors sought to recoup their investments, [*7] and Tannery attempted to recover the $ 20,000 overpayment on behalf of Branson. Tannery experienced difficulty in obtaining any money from Bayside, and Plaintiff Fisher allegedly told Tannery to apply for a loan in Branson's name, and Plaintiffs would repay it. Tannery applied for the loan and signed a letter of credit and promissory note in Branson's name, allegedly without Branson's knowledge or approval. Branson claimed to have first learned of Tannery's loan application after the application was submitted in November 1990. (Pls. App. n3 at 12.) On January 14,

1991, Branson revoked Tannery's power attorney and granted power of attorney to Michael Jaccar ("Jaccar"). Branson authorized Jaccar to gather all information regarding Tannery's investment of Branson's money in Bayside.

On March 13, 1992, an OTS employee (who is not named in this suit) [*8] interviewed Jaccar and reported the interview to OTS employee Frederick Teed. In the report, Jaccar stated that Branson was unaware of and did not authorize the loan, did not receive the loan proceeds, and was uncertain of the use of those proceeds. The report further stated that Branson believed that the funds "somehow went to Fisher and Carney," and that Plaintiffs were acting together with Tannery. (Pls. App. at 7.)

Subsequently, Federal Bureau of Investigation ("FBI") agents Vincent Fazzio and Jennifer Gant ("FBI Agents") opened a criminal investigation of Bayside and the Tannery/Branson loan. On August 26, 1992, Jaccar was interviewed by OTS employee Teed, Assistant United States Attorney Richard Kamp, and FBI agent Fazzio. (Pls. App. at 9.) During the interview, Jaccar reiterated Branson's statements that he did not authorize Tannery to take out the loan and he did not obtain the loan proceeds. (Pls. App. at 10.) The FBI memorialized the interview in a report on a standard "302" form used for recording witness interviews, and the parties refer to the report as the "Jaccar 302." On November 24, 1992, the FBI conducted a telephonic interview with Branson in which he substantiated [*9] Jaccar's statements. His interview was memorialized in a report referred to as the "Branson 302." (Pls. App. at 12.)

On February 1, 1993, OTS employee Rolf Nordstrom (then known as Rolf Colburn) notified Plaintiffs that the OTS would begin an "on-site examination" of Bayside. (Pls. App. at 13.) Plaintiffs allege that OTS employees Karen Bruton, Kenneth Klein, Bradford Lambert, Rolf Nordstrom, Richard Riccobono, and Frederick Teed ("OTS Defendants") either directly examined or supervised the examination of Bayside and its investors. During the same time, the FBI began a criminal investigation of Bayside.

On March 17, 1994, the Department of Justice ("DOJ") indicted Plaintiffs on charges arising from the FBI's investigation of the Tannery/Branson loan. The indictment charged Plaintiffs together and individually with conspiring to commit mail fraud, wire fraud, and bank fraud, and to make false statements to and obstruct the operation of the OTS. The prosecutors granted Tannery immunity in exchange for his testimony regarding Plaintiff Fisher's alleged offer to repay the Tannery/Branson loan. Tannery testified to the grand jury and at trial that Branson was aware of the loan, and that [*10] Branson's power of attorney authorized Tannery to sign Branson's name to the loan application. (Pls. App. at 6.) Tannery's testimony contravened the statements by Branson and Jaccar that Branson was unaware of the loan, did not request it, and did not authorize Tannery to sign his name to the loan application.

Before trial, Fisher's counsel requested all exculpatory evidence including any "information affecting the credibility of any person called as a witness by the Government." *Fisher, 106 F.3d at 634.* "The Government answered [that] it was unaware of any *Brady* material at that time." *Id.* It is undisputed

that Plaintiffs were not provided with the Branson 302 at that time. After Tannery testified, the defense filed another motion seeking exculpatory evidence specifically related to Tannery and any purported power of attorney from Branson. On the last day of trial, the prosecution produced to the defense the Branson 302, which contained Branson's statements that he did not request that Tannery obtain a loan from Bayside, he was unaware any such loan was requested in his name, and he did not know what happened to the proceeds. *See id.* Plaintiff Carney's [*11] counsel moved for a new trial on grounds that the Branson 302 was exculpatory evidence because Branson's statements were inconsistent with Tannery's testimony and its late production prevented the defense from using it to impeach Tannery. The district court ruled that the Branson 302 was not inconsistent with Tannery's testimony and denied the motion for a new trial. The jury convicted Plaintiffs, and they were sentenced to prison.

Plaintiffs filed a joint appeal, and on February 13, 1997, the Fifth Circuit Court of Appeals reversed Plaintiffs' convictions on several grounds. *See Fisher, 106 F.3d at 635* -- 36. The Fifth Circuit held that the late disclosure of the Branson 302 should have resulted in a new trial for Plaintiff Fisher. *See id.* The court did not, however, discuss the Branson 302 with respect to Plaintiff Carney. Plaintiff Carney's convictions were reversed on other grounds, including the district court's refusal to admit evidence of a successful arbitration and the admittance of an invalid conviction. The Fifth Circuit remanded both convictions for new trials. On October 3, 1997, the prosecution retried Plaintiffs.

Plaintiffs were acquitted of all [*12] charges except bank fraud, which had been dropped before trial.

B. Procedural History

The procedural history of this case is long and convoluted. n4 On September 3, 1999, Plaintiffs filed this suit alleging constitutional and common law tort claims against the United States, the OTS, and the FBI as well as DOJ employees, FBI Agents, and OTS Defendants in their official and individual capacities. Plaintiffs' claims are based on their contentions that OTS Defendants improperly used the savings and loan regulatory examination process to assist the FBI and the DOJ in their investigation and prosecution of Plaintiffs, and that all defendants improperly withheld exculpatory evidence. (Third Am. Compl. at P140.) The district court substituted the United States for all individual federal employees with respect to Plaintiffs' common law claims and dismissed all claims against the United States, the OTS, the FBI, the DOJ employees, and Plaintiffs' official capacity claims against FBI Agents and OTS Defendants.

Subsequently, the United States, the FBI, and other federal employees filed separate motions to dismiss Plaintiff's claims. OTS Defendants and FBI Agents did not join in these motions or file their own motions to dismiss. On March 31, 2003, the district court dismissed all of Plaintiffs' claims against the FBI, the United States, and the other federal employees. Thus, Plaintiff's only remaining claims are those against OTS Defendants and FBI Agents.

Plaintiffs' 99-page Third Amended Complaint contains several claims, but it does not clearly identify

the particular claims against each individual defendant. The Court held a case management conference on May 30, 2003, to determine which specific claims remained against FBI Agents and OTS Defendants. Based on the conference and the Court's review of the Third Amended Complaint, it is apparent that Plaintiffs do not allege each claim against each defendant individually. Although Plaintiffs' claims are often titled as being against "All Named Defendants," the body of each claim contains specific allegations against particular defendants. Thus, the Court will address the claims only as to the particular defendants against whom specific [*14] allegations are actually made.

OTS Defendants and FBI Agents assert the defense of qualified immunity with regard to the remaining claims against them. On July 22, 2003, the Court established a briefing schedule for dispositive motions on the issue of qualified immunity. Subsequently, Plaintiffs propounded written discovery requests, and FBI Agents and OTS Defendants jointly moved for protection from the requests on September 26, 2003. They argued that Plaintiffs' requests exceeded the scope of permissible discovery on the issue of qualified immunity. After a courtroom hearing on the motion on October 23, 2003, the Court determined that Plaintiffs could conduct limited discovery on the issue of qualified immunity with respect to their claims of withholding exculpatory evidence and subornation of perjury. In particular, discovery was allowed on the issues of whether FBI Agents and OTS Defendants deliberately concealed exculpatory evidence and whether OTS Defendants Lambert, Teed, and Nordstrom suborned perjury. Subsequently, Plaintiffs conducted written discovery and orally deposed each of the FBI Agents

and OTS Defendants. Plaintiffs have provided transcripts of these depositions. [*15] (Pls. App. at 111 -- 118.)

On November 17, 2003, FBI Agents and OTS Defendants filed separate motions for summary judgment with supporting evidence. Plaintiffs filed separate responses with supporting evidence and a joint appendix referred to in both responses. Because FBI Agents' and OTS Defendants' motions relate to substantially the same claims and argue similar grounds for summary judgment, and Plaintiffs cite substantially the same evidence in their responses, the Court addresses the motions together in the interests of judicial economy. The motions are now before the Court and ripe for determination.

II. ANALYSIS

A. Summary Judgment Standard

This case involves issues of law and fact. "Summary judgment is an appropriate mechanism for resolving issues of law arising from a materially complete factual record." *Burlington Northern and Santa Fe Ry. Co. v. Brotherhood of Maintenance of Way Employees, 93 F. Supp. 2d 751, 756 (N.D. Tex. 2000).* "Furthermore, disputes over the legal inferences to be gleaned from the facts in evidence will not prevent summary judgment; thus, where a non-movant merely debates the consequences flowing from admitted facts, [*16] summary judgment is proper." *Id.* Summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *See Little v. Liquid Air Corp., 37 F.3d 1069, 1075*

(5th Cir. 1994). "The substantive law will identify which facts are material[,]" and only genuine disputes about material facts will preclude summary judgment. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. If the non-movant bears the burden of proof at trial, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. *Latimer v. Smithkline & French Lab., 919 F.2d 301, 303 (5th Cir. 1990)*. Once the movant makes this showing, the burden shifts to the non-movant to show that summary judgment is inappropriate. *Little, 37 F.3d at 1075*. The non-movant cannot meet his burden with unsubstantiated assertions, conclusional allegations, or a scintilla of evidence. *See id.* Furthermore, the court must view all of the evidence in the light most favorable to the non-movant. [*17] n5 *See Richter v. Merchants Fast Motor Lines, Inc., 83 F.3d 96, 98 (5th Cir. 1996)*.

B. Supervisory Liability

1. Respondeat Superior

Plaintiffs expressly assert claims under the doctrine of respondeat superior n6 against OTS Defendants Riccobono and Klein. It is well-settled that respondeat superior liability is not recognized in a *Bivens* action. *See Cronn v. Buffington, 150 F.3d 538, 544 (5th Cir. 1998)* (recognizing that "there is no doctrine of respondeat superior in *Bivens* actions") (citing *Abate v. Southern Pac. Transp. Co., 993 F.2d 107, 110 (5th Cir. 1993)* (citing cases)). "Rather, a supervisory official may be held liable when he is either personally involved in the acts causing the deprivation of a person's constitutional rights, or 'if he implements a policy so deficient that the policy itself acts as a deprivation of

constitutional rights.'" *Johnson v. Ramos, 2003 U.S. Dist. LEXIS 2027, 2003 WL 22946476, at *5 (N.D. Tex. February 11, 2003)* (quoting *Cronn, 150 F.3d at 544*). Accordingly, to the extent that Plaintiffs assert a cause of action under the doctrine of respondeat superior, summary judgment should be granted.

2. Deficient Policy

Plaintiffs allege that OTS Defendants Riccobono and Klein implemented a deficient policy that deprived them of their constitutional rights. (Third Am. Compl. at 95.) Plaintiffs' complaint alleges that these defendants are liable for "policies and failure to implement policies[,]" but it does not identify any particular "policies." *See id.* In Plaintiffs' responses, they allege that the offending "policy" was OTS Defendants Riccobono's and Klein's failure to train other OTS Defendants regarding OTS Regulatory Bulletin 18 -- 4. (Resp. at 32 -- 34.) OTS Regulatory Bulletin 18 -- 4, advises OTS employees against the improper gathering of evidence for the purpose of making a criminal referral:

> The OTS's investigative powers may *not* be used to conduct a criminal investigation or to gather documents for the purposes of making a criminal referral. . . . However, when information obtained for an authorized civil purpose is sufficient to provide a reasonable factual basis that a crime has been or may be committed . . . OTS personnel in the District or in Enforcement will make appropriate criminal referrals, using the OTS's Form 366.

(Resp. [*20] App. at Ex. 29.) Plaintiffs allege that OTS Defendants Riccobono and Klein were responsible for ensuring compliance with this bulletin, that they failed to train other OTS Defendants on its commands, and that the failure resulted in the "highly likely consequence" that exculpatory evidence would be withheld with "deliberate indifference" to Plaintiffs' constitutional rights. *See id.* at 34 -- 35.

A failure to train may show the implementation of a deficient policy. *See City of Canton v. Harris, 489 U.S. 378, 380, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989)* (holding that a municipality can be held liable under *§ 1983* "for constitutional violations resulting from its failure to train municipal employees."), *cited in Bradley v. United States, 164 F. Supp. 2d 437, 453 (D.N.J. 2001)* (explaining that a failure to train claim under *Bivens* requires that the plaintiff show "the officers acted pursuant to a [federal] custom or policy not to adequately train or supervise."). However, a negligent failure to train is insufficient; a plaintiff must show that the failure to train was done with "deliberate indifference" to his rights. *See Board of County Comm'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 407, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997)* [*21] ("A showing of simple or even heightened negligence will not suffice."); *accord Ting v. United States, 927 F.2d 1504, 1512 (9th Cir. 1991)* (noting that an "inadequacy of police training may serve as a basis for liability under *section 1983* or *Bivens* 'only where the failure to train amounts to deliberate indifference'").

A showing of deliberate indifference usually requires "proof of more than a single instance of the lack of training or supervision causing a violation of constitutional rights[.]" *Thompson v. Upshur County,*

TX, 245 F.3d 447, 459 (5th Cir. 2001). For example, Plaintiffs may present evidence showing a pattern of similar violations. *See id.* "However, a single incident of an alleged constitutional violation resulting from the failure to train may serve as a basis for liability so long as that violation was an obvious consequence of the failure to train." *Barnes v. Barnes, 2004 U.S. Dist. LEXIS 23180, 2004 WL 691202, at *10 (N.D. Tex. March 30, 2004)* (citing *Brown v. Bryan County, 219 F.3d 450, 454, 460 (5th Cir. 2000))*. Finally, the inadequacy of training must be obvious and obviously likely to result in a constitutional [*22] violation, and liability attaches only if there is direct causation between the policy and the injury. *See Thompson, 245 F.3d at 459; see also Brown, 219 F.3d at 460.*

Plaintiffs do not present evidence of a pattern of violations. Rather, Plaintiffs allege that the violations to their rights were the obvious consequences of the alleged failure to train OTS Defendants regarding OTS Regulatory Bulletin 18 -- 4. (Resp. at 33 -- 34.) Plaintiffs cite the deposition testimony of OTS Defendants Riccobono and Klein as evidence of their failure to train. (Resp. at 33 -- 34; App. at 29.) The cited portions of these defendants' deposition testimony reflect that at the time of the OTS examination and FBI investigation, neither defendant implemented or trained other OTS Defendants regarding OTS Regulatory Bulletin 18 -- 4. (Resp. at 33 -- 34.) However, this bulletin does not relate to Plaintiffs' claims that OTS Defendants withheld exculpatory evidence or suborned perjury. Indeed, the bulletin concerns the gathering of information during an OTS regulatory examination, not the handling of evidence during a criminal proceeding. Plaintiffs do not explain how the failure [*23] to train

other OTS Defendants on this bulletin would have resulted in the "obvious consequence" of violating Plaintiffs' rights.

Viewing all evidence in the light most favorable to Plaintiffs, Plaintiffs have failed to show a genuine issue of law or fact regarding whether the alleged failure to train on this bulletin violated their rights. Because Plaintiffs claim that the offending "policy" was OTS Defendants Riccobono's and Klein's failure to train, and Plaintiffs did not establish a failure to train, Plaintiffs have failed to show a deficient policy. Accordingly, OTS Defendants Riccobono and Klein should be granted summary judgment on Plaintiffs' claims with regard to the implementation of a deficient policy. *See id.*

C. Malicious Prosecution

Plaintiffs assert constitutional malicious prosecution claims against OTS Defendants and FBI Agents. n7 (Third Am. Compl. at 75 -- 77.) OTS Defendants move for summary judgment on Plaintiffs' constitutional malicious prosecution claims. (OTS Defs. Br. at 12 -- 13.) FBI Agents do not move for summary judgment on Plaintiffs' constitutional malicious prosecution claims. Nevertheless, the Court may raise the issue of summary judgment [*24] *sua sponte* and may grant it *sua sponte* if the record does not support this claim. *See Ficq v. Texas Instruments Inc.*, 2004 WL 576057, at *1 (N.D. Tex. March 1, 2004) ("it is well settled that a judge not only may raise summary judgment *sua sponte*, he may grant it *sua sponte*.") (citing *Missouri Pac. R.R. v. Harbison-Fischer Mfg. Co., 26 F.3d 531, 539 (5th Cir. 1994)*).

There is no "freestanding constitutional right to be free from malicious prosecution[. [*25]]" *Castellano v. Fragozo, 352 F.3d 939, 941 (5th Cir. 2003) (en banc), cited in Hamilton v. Collett, 83 Fed. Appx. 634, 636, 2003 WL 22965650, at *2 (5th Cir. 2003)* (explaining that "this court has recently held that a claim of malicious prosecution standing alone does not violate the United States Constitution."). Rather, a malicious prosecution claim must specify the particular constitutional right allegedly violated: "This conclusion in turn means that we must insist on clarity in the identity of the constitutional violations asserted." *Castellano, 352 F.3d at 941.* Despite three opportunities to amend their complaint, Plaintiffs allege only a stand-alone constitutional claim for malicious prosecution. Because the Fifth Circuit does not recognize a stand-alone claim for constitutional malicious prosecution, this claim fails as a matter of law. *See id.* Accordingly, OTS Defendants and FBI Agents should be granted summary judgment on Plaintiffs' claims for "federal" malicious prosecution. *See id.*

D. Perjury

Plaintiffs assert perjury claims against OTS Defendants Nordstrom and Lambert. (Third Am. Compl. at [*26] 80 -- 86.) OTS Defendants Nordstrom and Lambert move for summary judgment on Plaintiffs' perjury claims on grounds that they testified truthfully and they are otherwise entitled to absolute immunity.

It is well-settled that trial witnesses are entitled to absolute immunity for their trial testimony. *See Charles v. Wade, 665 F.2d 661, 666 (5th Cir. 1982)* (finding absolute immunity from *Bivens* action for trial witnesses); *see also Briscoe v. LaHue, 460 U.S. 325, 331,*

334, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983) (holding that trial witnesses are shielded by absolute immunity). There is an exception to absolute immunity, however, when a witness is a "complaining witness," which is defined as one who "instigates, encourages, or continues the prosecution[.]" *Keko v. Hingle, 318 F.3d 639, 643 (5th Cir. 2003).*

Plaintiffs argue that OTS Defendants Nordstrom and Lambert were complaining witnesses. (Resp. at 2-4; Third Am. Compl. at PP185 -- 187.) Plaintiffs allege that OTS Defendants Nordstrom and Lambert utilized the regulatory examination process as a means of instigating and furthering the criminal investigation and prosecution of Plaintiffs. However, [*27] Plaintiffs fail to present any evidence showing that OTS Defendants Nordstrom and Lambert instigated, encouraged, or continued Plaintiffs' prosecution. Plaintiffs' conclusory allegations that OTS Defendants Nordstrom and Lambert were aware of an ongoing criminal investigation and made documents available to the FBI are insufficient to create a genuine issue of fact or law showing that these defendants instigated or furthered the prosecution. *See Keko, 318 F.3d at 643.* Thus, Plaintiffs have failed to show that OTS Defendants Nordstrom and Lambert were complaining witnesses.

Moreover, even assuming for purposes of this motion that OTS Defendants Nordstrom and Lambert defendants were complaining witnesses, Plaintiffs have presented no evidence that they testified falsely. Plaintiffs allege that these defendants testified falsely about the extent of coordination between the OTS regulatory examination and the FBI's criminal investigation. (Third Am. Compl. at 80 -- 86; Fisher

Decl. at 20.) Specifically, Plaintiffs contend that OTS Defendants Nordstrom and Lambert presented testimony that mischaracterized or misrepresented OTS Defendants' coordination with the FBI and Plaintiffs' [*28] filings with the OTS. *See id.* However, Plaintiffs cite no evidence showing that OTS Defendants Nordstrom's and Lambert's testimony was actually false. Accordingly, Plaintiffs have not shown a genuine issue or fact or law as to whether OTS Defendants Nordstrom and Lambert were complaining witnesses or testified falsely. Thus, OTS Defendants Nordstrom and Lambert should be granted summary judgment on Plaintiffs' perjury claims.

E. Subornation of Perjury

Plaintiffs allege claims for subornation of perjury against all OTS Defendants and FBI Agent Fazzio, but not FBI Agent Gant. (Third Am. Compl. at 71 -- 73.) OTS Defendants move for summary judgment on Plaintiffs' subornation of perjury claims on the grounds that they are entitled to qualified immunity. FBI Agent Fazzio has not moved for summary judgment on Plaintiffs' subornation of perjury claim against him. Nevertheless, the Court may raise the issue of summary judgment *sua sponte* and may grant it *sua sponte* if this claim is unsupported by the record. *See Ficq*, 2004 WL 576057, at *1.

1. Qualified Immunity Standard

"Public officials acting within the scope of their official duties [*29] are shielded from civil liability by the qualified immunity doctrine." *Kipps v. Caillier, 197 F.3d 765, 768 (5th Cir. 1999)*. Government officials are entitled to qualified immunity "insofar as their conduct

does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (quoting *Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)*); *see also Jones v. Soles, 2001 U.S. Dist. LEXIS 21079, 2001 WL 1636362, at *3 (N.D. Tex. Dec. 18, 2001).* Qualified immunity encompasses claims of conspiracy to commit an alleged violation. *See Mowbray v. Cameron County, Tex., 274 F.3d 269, 279-80 (5th Cir. 2001)* (finding that because the police office "is entitled to qualified immunity for his actions," "the § *1983* conspiracy claim based on them must fail."). n8

[*30]

Once qualified immunity has been asserted, the plaintiff bears the burden of negating it. *See Foster v. City of Lake Jackson, 28 F.3d 425, 429 (5th Cir. 1994).* The plaintiff must show that there is a genuine issue as to whether the defendant "(1) violated a constitutional right that (2) was clearly established at the time of the violation (3) through conduct that was objectively unreasonable." *Mowbray, 274 F.3d at 279-80*; *see also Weddle v. Ferrell, 2000 U.S. Dist. LEXIS 2659, 2000 WL 256891, at *3 n.1 (N.D. Tex. March 6, 2000)* (noting "Some panels of the Fifth Circuit have condensed the qualified immunity analysis into two steps, but the relevant points of inquiry in each analysis are the same."). If the plaintiff fails to show a genuine issue with respect to each element, the official is entitled to qualified immunity. *See Mowbray, 274 F.3d at 280* (finding that a police officer was entitled to qualified immunity because the plaintiff had failed to show a violation to a constitutional right).

2. Failure to Correct

Plaintiffs allege that OTS Defendants and FBI Agent Fazzio "were in possession of the examination workpapers" of OTS [*31] Defendant Lambert "that wholly contradicted, impeached and demonstrated that Tannery was committing perjury before the trial jury and they sat silent as the jury considered such evidence in convicting Plaintiffs on Count 10 of the indictment." (Resp. at 29; Third Am. Compl. at 71 -- 73.) Plaintiffs claim that the failure to correct Tannery's testimony resulted in subornation of perjury.

A defendant's due process rights are violated when the prosecution knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *See Faulder v. Johnson, 81 F.3d 515, 519 (5th Cir. 1996).* "To obtain relief, the defendant must show that (1) the testimony was actually false, (2) the state knew it was false and (3) the testimony was material." *Id.* (citing *Kirkpatrick v. Whitley, 992 F.2d 491, 497 (5th Cir.1993)*). If the prosecutor is aware of the untrue nature of the testimony, the prosecutor bears the burden of correcting that testimony. *See Napue v. Illinois, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959)* (finding that a "failure of State to correct testimony known to be false violates due process"). If the prosecutor is unaware [*32] of the untrue nature of the testimony, other members of the prosecutorial team who are aware may be liable for allowing the untrue testimony to go uncorrected. *See Burge v. Parish of St. Tammany, 187 F.3d 452, 480 n.11 (5th Cir. 1999)* ("suborning perjury and concealing exculpatory evidence by police officers were constitutional violations."); *see also Luna v. Beto, 391 F.2d 329, 332 (5th Cir. 1967)* (holding that the state was liable for

allowing the testimony to go uncorrected based on a police officer's knowledge of the false nature of the testimony).

With regard to the first element of their claim, Plaintiffs must present evidence showing that Tannery's testimony was actually false in order to maintain their subornation of perjury claims. *See Faulder, 81 F.3d at 519.* Plaintiffs refer the Court to the Fifth Circuit's opinion in *Fisher* as evidence that Tannery's testimony was false. However, the Fifth Circuit did not state that Tannery's testimony was false, but rather found that the Branson 302 "was directly contradictory to what Tannery testified to both in the grand jury hearing and at trial." *Fisher, 106 F.3d at 634.* [*33] Plaintiffs conflate falsity with contradiction. Contradiction in witnesses' statements may present a credibility question for the jury but it does not necessarily constitute perjury. *See United States v. Brown, 634 F.2d 819, 827 (5th Cir. 1981)* (explaining that the proof that a witness's "testimony is challenged by another witness or is inconsistent with prior statements" is insufficient to establish due process violation); *see also United States v. Miranne, 688 F.2d 980, 989 (5th Cir. 1982)* ("finding that the differing testimony of two government witnesses presented at most a credibility question for the jury"); *United States v. Martinez-Mercado, 888 F.2d 1484, 1492 (5th Cir. 1990)* (contradictory testimony, standing alone, is not tantamount to perjury); *Maki v. Dretke, 2004 U.S. Dist. LEXIS 5600, 2004 WL 719146, at *1 (N.D. Tex. April 1, 2004)* (same). Thus, Plaintiffs have not shown that Tannery's testimony was actually false.

Moreover, Plaintiffs fail to present evidence showing a genuine issue of fact on the second element,

that OTS Defendants and FBI Agent Fazzio knew of Tannery's testimony when it occurred. All OTS Defendants have provided [*34] declarations stating that they did not plan nor encourage Tannery's testimony, nor were they contemporaneously aware of it. (Bruton Decl. at P9; Klein Decl. at P5; Lambert Decl. at P12; Nordstrom Decl. at P12; Riccobono Decl. at P5; Teed Decl. at P10.) In response, Plaintiffs allege that "Defendants coerced Tannery into testifying falsely against Plaintiffs." (Third Am. Compl. at 73.) However, Plaintiffs have failed to present evidence supporting this allegation or showing that OTS Defendants and FBI Agent Fazzio knew of Tannery's testimony when it occurred. Thus, Plaintiffs fail to show a genuine issue of fact or law on two elements of their claims that OTS Defendants and FBI Agent Fazzio suborned perjury. Consequently, OTS Defendants and FBI Agent Fazzio are entitled to summary judgment on Plaintiffs' claims for subornation of perjury.

F. Withholding Exculpatory Evidence

Plaintiffs also allege that all OTS Defendants, except Riccobono, and both FBI Agents withheld and conspired to withhold exculpatory evidence. (Third Am. Compl. at 65 -- 75.) OTS Defendants and FBI Agents move for summary judgment on grounds of qualified immunity. As previously set forth, Plaintiffs must [*35] show a genuine issue of law or fact regarding whether OTS Defendants or FBI Agents "(1) violated a constitutional right that (2) was clearly established at the time of the violation (3) through conduct that was objectively unreasonable" to overcome qualified immunity *Mowbray, 274 F.3d at 279-80*; *see also Foster, 28 F.3d at 429*.

1. OTS Defendants

OTS Defendants argue that as a matter of law, they are not responsible for the withholding of exculpatory evidence and their actions were objectively reasonable because they submitted all evidence to the FBI. OTS Defendants have proffered declarations stating that they made available to the FBI all documents related to their regulatory examination of Bayside, and no materials were withheld from production to the FBI or the prosecutors. (OTS Defs. App. at 1 -- 6.) Plaintiffs contend that OTS Defendants withheld the Branson 302, the Jaccar 302, other documents containing correspondence with Jaccar and Tannery regarding Tannery's alleged forgery, and documents regarding an investigation of fraud charges against governmental witness Joseph Courrege. (Third Am. Compl. at PP132 -- 143, 155 -- 159.) As [*36] evidence of such withholding, Plaintiffs refer the Court to the Fifth Circuit's opinion in *Fisher*, Plaintiff Fisher's declaration, John Roger Coston's declaration n9, and a 1040-page, two-volume appendix.

Plaintiffs argue that *Fisher*, which reversed Plaintiffs' convictions, stands as the "law of the case" that OTS Defendants withheld exculpatory evidence. (Resp. at 36 -- 38.) The "law of the case" doctrine "is an exercise of judicial discretion which merely expresses the practice of the courts generally to refuse to reopen what has been decided." *United States v. Phipps, 368 F.3d 505, 2004 U.S. App. LEXIS 8176, 2004 WL 880154, at *3 (5th Cir. 2004)*. Although the Fifth Circuit found in *Fisher* that the Branson 302 was exculpatory, it did not address who was responsible for its late disclosure. n10 *See Fisher, 106 F.3d at 635*. [*37] Rather, the Fifth

Circuit referred to the "Government" as the responsible party:

> In its indictment against Carney, Fisher, Noebel and Hughes, *the Government* charged they conspired to commit mail fraud, wire fraud, and bank fraud, and also conspired to make false statements to and obstruct the operation of the FHLBB and Office of Thrift Supervision. . . . The Government's failure to release this material information to the defense was error, and should have resulted in a new trial for Fisher.

Id. at 627, 635 (emphasis added). Thus, the *Fisher* court did not determine which members of the prosecution team withheld exculpatory evidence. Accordingly, *Fisher* does not stand as "law of the case" with respect to Plaintiffs' allegations that *OTS Defendants* were responsible for withholding exculpatory evidence.

a. OTS Defendants Teed, Lambert, and Nordstrom

Plaintiffs also refer the Court to Plaintiff Fisher's declaration, which repeats fifteen pages of argument from Plaintiffs' brief and states that OTS Defendants withheld exculpatory "e-mail traffic" from the FBI:

> OTS personnel Mr. Teed, Mr. Lambert, Mr. Colburn [Nordstrom] with held [sic] evidence from the FBI investigators by with holding [sic] all the e-mail traffic provided in this case from the investigators. The documents contain significant *Brady*

> and *Giglio* material. I have personal knowledge of this from witnessing their deposition statements and reviewing the nearly 40,000 thousand [sic] images provided as discovery in this case. Their [OTS Defendants'] statements in the [sic] affidavits indicating they provided all the relevant documentation available to the FBI and Prosecutors is [sic] false.

(Fisher Decl. at 20.) Each OTS Defendant has submitted a declaration stating that he or she made available to FBI Agents all documents in their possession, control, or custody that were related to Plaintiffs. (OTS Defs. App. at 1 -- 6.) They each claim that they did not decide what evidence was [*39] disclosed to Plaintiffs. *Id.*

Plaintiff Fisher's declaration conflicts with OTS Defendants' declarations. Ordinarily, *Rule 56* does not authorize summary judgment when a court is faced with conflicting sworn statements. *See Bowen v. GDMFC, Inc., 1999 U.S. Dist. LEXIS 3824, 1999 WL 172291, at *4 (N.D. Tex. March 22, 1999)* (citing *Farbwerke Hoeschst A.G. v. M/V "Don Nicky", 589 F.2d 795, 798 (5th Cir. 1979)* ("In making its [summary judgment] determination, the court may not weigh conflicting affidavits to resolve disputed fact issues.")). However, when an sworn statement is conclusory and not based on personal knowledge, then it is entitled to no weight. *See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 at 888, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)* ("The object of [*Rule 56(e)*] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); *see also Akin v. Q-L*

Investments, Inc., 959 F.2d 521, 530 (5th Cir. 1992) (explaining that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein."). [*40] "Affidavits that do not comply with these requirements are legally insufficient and are entitled to no weight." *Williamson v. United States Dep't of Agriculture 815 F.2d 368 at 383.*

OTS Defendants argue that Plaintiff Fisher's declaration is conclusory and fails to meet the requirements of *FED. R. CIV. P. 56(e)*, and thus, should be accorded no weight. (OTS Defs. Reply at 2 n.2.) Although Plaintiff Fisher refers to and has provided OTS Defendants Teed's, Lambert's, and Nordstrom's deposition transcripts, he does not cite the e-mails that were allegedly withheld nor a specific portion of these transcripts. Rather, Plaintiff Fisher makes the conclusory assertion that these e-mails contain "significant" exculpatory evidence as established by deposition testimony and some 40,000 images. (Fisher Decl. at 20.) The Court is not required to search the record to find support for Plaintiff Fisher's averments; rather, it "need rely only on those portions of the submitted documents to which the nonmoving party directs the Court's attention." *Barnes*, 2004 WL 691202, at *6; *see also Ragas v. Tenn. Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998)* [*41] ("The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim."). Whether evidence is exculpatory is a question for the Court, and Plaintiff Fisher does not direct the Court's attention to any particular allegedly

exculpatory e-mail. In fact, Plaintiff Fisher fails to direct the Court's attention to *any* evidence showing that OTS Defendants Teed, Lambert, and Nordstrom withheld exculpatory evidence. It does not appear from Plaintiff Fisher's affidavit that he has personal knowledge of the withholding of any exculpatory evidence by these defendants.

Accordingly, Plaintiff Fisher's statement that OTS Defendants Teed, Lambert, and Nordstrom withheld exculpatory e-mails does not appear to be based on his personal knowledge, and the Court strikes this statement from the summary judgment evidence. *See Strain v. Kaufman County Dist. Attorney's Office, 23 F. Supp. 2d 685, 696 (N.D. Tex. 1998)* (striking statements that were "self-serving and recounting alleged occurrences of which Plaintiffs have no personal knowledge in violation of *FED. R. CIV. P. 56(e)* [*42] .").

b. All OTS Defendants

Plaintiffs also allege that all OTS Defendants are liable for the withholding of Plaintiffs' Exhibits 1 -- 17 and 19 -- 23 as part of the "prosecutorial team." (Fisher Decl. at 8 -- 17.) A *Bivens* action must be based upon the personal involvement of a particular individual, rather than group liability. *See F.D.I.C. v. Meyer, 510 U.S. 471, 485, 127 L. Ed. 2d 308, 114 S. Ct. 996 (1994)* (explaining that it "must be remembered that the purpose of *Bivens* is to deter the officer."); *see also Rivera v. Commandant of the United States Marine Corps, 2000 U.S. App. LEXIS 26672, 2000 WL 1581001, at *1 (D.C. Cir. Sept. 26, 2000)* (noting that "to the extent appellant is suing a federal official in his individual capacity, the complaint does not allege any

personal involvement") (citing *Simpkins v. District of Columbia Gov't, 323 U.S. App. D.C. 312, 108 F.3d 366, 369 (D.C. Cir. 1997)* (explaining that the complaint must allege personal involvement by government official in events giving rise to constitutional claim); *Cameron v. Thornburgh, 299 U.S. App. D.C. 228, 983 F.2d 253, 258 (D.C. Cir. 1993)* (same)); *accord Davis v. United States, 2004 U.S. Dist. LEXIS 2551, 2004 WL 324880, at *9 (S.D.N.Y. Feb. 19, 2004)* [*43] ("Davis' failure to allege that Delia was personally involved in the complained of acts is fatal to his claim.").

Plaintiffs have presented no evidence showing personal involvement by each OTS Defendant with respect to the handling of Plaintiffs' Exhibits 1 – 17 and 19 -- 23. Rather, Plaintiffs base their claims on impermissible allegations of group liability. Thus, even accepting Plaintiffs' allegations as true and construing all of the evidence in Plaintiffs' favor, allegations of group liability fail as a matter of law in a *Bivens* action. *See F.D.I.C., 510 U.S. at 485; see also Cameron, 983 F.2d at 258.*

Plaintiffs have failed to present competent summary judgment evidence showing that a genuine issue of fact or law exists as to whether each OTS Defendant withheld exculpatory evidence. Accordingly, each OTS Defendant is entitled to qualified immunity with regard to Plaintiffs' claims for withholding of exculpatory evidence, and summary judgment should be granted in favor of OTS Defendants on these claims. *See Mowbray, 274 F.3d at 280* (finding that a police officer was entitled to qualified immunity [*44] because the plaintiff had failed to show a violation to a constitutional right). n11

2. FBI Agents

FBI Agents assert qualified immunity with regard to Plaintiffs' *Brady* violation claims. Plaintiffs must show a genuine issue with regard to whether FBI Agents were responsible for withholding exculpatory evidence. *See Mowbray, 274 F.3d at 280* (concluding that the police officer was entitled to qualified immunity because the plaintiff had failed to show that *the officer* violated any constitutional right); *see also Weddle, 2000 U.S. Dist. LEXIS 2659, 2000 WL 256891, at *3* (noting that the plaintiff had stated a claim that *the police officer* violated his constitutional rights).

Plaintiffs again refer the Court to the Fifth Circuit's opinion [*45] in *Fisher* as evidence that FBI Agents withheld exculpatory evidence in violation of Plaintiffs' constitutional rights. As explained above, the Fifth Circuit did not attribute the untimely disclosure of the Branson 302 to any particular individual. *See Fisher, 106 F.3d at 634-35.* Accordingly, *Fisher* does not necessarily show a genuine issue with regard to whether FBI Agents were responsible for the late disclosure of the Branson 302.

Plaintiffs also refer the Court to Plaintiff Fisher's declaration. Plaintiff Fisher avers that FBI Agents decided what evidence would be provided to Plaintiffs and that FBI Agents provided all evidence to Plaintiffs:

> At all relevant times during pre trial [sic] discovery for both criminal trials, I only obtained discovery and access to materials from the FBI through [FBI Agents]. At no time was I ever provided with discovery or access to evidentiary material by the prosecutors or US [sic] Attorney's office. The FBI, Gant and Fazio [sic], determined

> what materials were made available to our defense team. . . . The FBI agents decided what they produced[,] not the prosecutors[,] based upon my personal knowledge [*46] at the time.

(Fisher Decl. at 18.) FBI Agents have provided affidavits stating that they "did not make or participate in the decisions [regarding] . . . what documents, evidence, or other materials would be turned over to [Plaintiffs]. Such decisions were made exclusively by the prosecutors and/or their supervisors in the case." (FBI Agents App. at 1 – 2.)

Plaintiff Fisher's declaration conflicts with FBI Agents' affidavits. As discussed more fully with respect to the OTS Defendants, if Plaintiff Fisher's declaration is conclusory and not based on personal knowledge, then it is entitled to no weight. *See Lujan, 497 U.S. at 888*; *see also Akin, 959 F.2d at 530*; *Williamson, 815 F.2d at 383*. FBI Agents object to Plaintiff Fisher's declaration as conclusory, speculative, and made without his personal knowledge in violation of *Rule 56*. While Plaintiff Fisher may have personal knowledge that FBI Agents physically transferred evidence to him or his defense team, he does not explain the basis for his alleged personal knowledge regarding who made the decision to disclose exculpatory evidence. Plaintiffs have identified no supporting [*47] evidence in the record that FBI Agents made the disclosure decision. Plaintiff Fisher's statement that FBI Agents made the decision appears to be conclusory and speculative rather than based on his personal knowledge. Speculative or conclusory allegations are incompetent summary judgment evidence. *See Lujan, 497 U.S. at*

*888, quoted in Savariego v. Melman, 2002 U.S. Dist. LEXIS 8563, 2002 WL 1788012, at *2 n.4 (N.D. Tex. May 10, 2002)* (not recognizing unauthenticated hearsay in an affidavit as competent summary judgment evidence) (Lynn, J.). Because Plaintiff Fisher's allegation that FBI Agents decided what would be disclosed is without support in the record, the Court sustains FBI Agents' objections, and strikes this statement from the summary judgment evidence. *See Strain, 23 F. Supp. 2d at 696* (striking statements as "self-serving and recounting alleged occurrences of which Plaintiffs have no personal knowledge in violation of *FED. R. CIV. P. 56(e).*").

Plaintiffs present no other evidence supporting their contention that FBI Agents withheld exculpatory evidence. Because Plaintiffs have failed to identify any competent [*48] summary judgment evidence in the record that raises a genuine issue of fact or law regarding whether FBI Agents withheld exculpatory evidence, Plaintiffs have failed to show that FBI Agents violated their constitutional rights. Accordingly, FBI Agents are entitled to qualified immunity from Plaintiffs' claims that they withheld exculpatory evidence. *See Mowbray, 274 F.3d at 280* (finding that a police officer was entitled to qualified immunity because the plaintiff had failed to show a violation to a constitutional right). Because the FBI Agents are entitled to qualified immunity from the underlying claim, they are also entitled to immunity from Plaintiffs' claim for conspiracy to withhold exculpatory evidence. *See id.* Accordingly, FBI Agents' motion for summary judgment on the basis of qualified immunity should be granted.

III. RECOMMENDATION

For the foregoing reasons, the court **RECOMMENDS** that the *Motion for Summary Judgment on Behalf of Karen Bruton, Kenneth Klein, Bradford Lambert, Rolf Nordstrom, Richard Riccobono and Frederick Teed* be **GRANTED**, the *Motion for Summary Judgment of Defendants Vincent G. Fazzio and Jennifer Gant* be [*49] **GRANTED**, and this action be **DISMISSED** with prejudice against defendants Karen Bruton, Kenneth Klein, Bradford Lambert, Rolf Nordstrom, Richard Riccobono, Frederick Teed, Vincent Fazzio, and Jennifer Gant.

SO RECOMMENDED on this 9th day of June 2004.

IRMA CARRILLO RAMIREZ

UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a copy of these findings, conclusions, and recommendation on all parties by mailing a copy to each of them. Pursuant to *28 U.S.C. § 636(b)(1)*, any party who desires to object to these findings, conclusions and recommendation must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings, conclusions, or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. Failure to file written objections to the proposed findings, conclusions, and recommendation within ten days after being served with a copy shall bar the aggrieved party from appealing the factual findings [*50] and legal conclusions of the Magistrate Judge

that are accepted by the District Court, except upon grounds of plain error. *Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).*

IRMA CARRILLO RAMIREZ

UNITED STATES MAGISTRATE JUDGE

Footnotes

n1 Actions against federal employees in their individual capacities for constitutional violations may be brought under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971). See Melear v. Spears, 862 F.2d 1177, 1182 & n.5 (5th Cir. 1989).*

n2 The background facts of this case are undisputed and taken largely from the Fifth Circuit Court of Appeals' opinion reversing Plaintiffs' convictions in the underlying criminal case, *United States v. Fisher, 106 F.3d 622 (5th Cir. 1997).*

n3 Plaintiffs have submitted separate responses and a joint appendix in response to both motions for summary judgment. The Court refers to the joint appendix as "App."

n4 The procedural history of this case is more fully set forth in the Court's December 5, 2002 recommendation, which was adopted by the District Court by order dated March 31, 2003.

n5 Although Plaintiff Carney is proceeding *pro se*, he is an attorney who has been licensed by the State of Texas since 1981. While *pro se* parties are normally accorded more leniency in the construction of their

pleadings, *see Estelle v. Gamble, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976)*, the Court need not afford a licensed attorney such leniency when the attorney appears *pro se. See Harbulak v. Suffolk County, 654 F.2d 194, 198 (2d Cir. 1981)* (holding that the plaintiff "is a practicing attorney and, therefore, cannot claim the special consideration which courts customarily grant to *pro se* parties"); *Tindall v. Gibbons, 156 F. Supp. 2d 1292, 1294 n.1 (M.D. Fla. 2001)* (same); *DeFina v. Latimer, 79 F.R.D. 5, 7 (E.D.N.Y. 1997)* (same). Plaintiff Fisher is represented by counsel. Accordingly, the Court need not extend the same leniency to Plaintiffs' pleadings that it normally extends to other *pro se* pleadings.

n6 Despite express invocation of this doctrine, Plaintiffs do not seek to hold OTS Defendants Riccobono and Klein liable for the conduct of subordinate OTS Defendants. Rather, Plaintiffs allege that OTS Defendants Riccobono and Klein were personally involved in violating their constitutional rights and that they implemented a deficient policy by failing to train the other OTS Defendants with respect to limits on the gathering of evidence in the OTS regulatory examination. (Third Am. Compl. at 95; Resp. at 32 -- 35.) The Court separately addresses these claims below.

n7 OTS Defendants and FBI Agents both argue that Plaintiffs' malicious prosecution claims are not against them. In their Third Amended Complaint, Plaintiffs assert claims for "STATE AND FEDERAL" malicious prosecution against "ALL NAMED DEFENDANTS." Plaintiffs' state law malicious prosecution claims were dismissed by a previous Order. (9/13/00 Ord. at 6 -- 7.) The Court assumes for the purposes of this analysis

that Plaintiffs' constitutional malicious prosecution claims are alleged against all OTS Defendants and FBI Agents.

n8 Analyses of qualified immunity under *42 U.S.C. § 1983* apply equally to *Bivens* actions. *See Wilson v. Layne, 526 U.S. 603, 609, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999)* (recognizing that the analysis is the same).

n9 Coston is a former agent with the Drug Enforcement Administration. His declaration presents his opinions on the manner in which a federal law enforcement officer should handle exculpatory evidence.

n10 Moreover, *Fisher* addressed only whether disclosure of the Branson 302 was a violation of Plaintiff Fisher's right to exculpatory evidence: "The Government's failure to release [the Branson 302] to the defense was error, and should have resulted in a new trial for Fisher." *Fisher, 106 F.3d at 632-34. Fisher* did not address whether the disclosure of the Branson 302 was a violation of Plaintiff Carney's rights.

n11 OTS Defendants should likewise be granted summary judgment on Plaintiffs' claim for conspiracy to withhold exculpatory evidence because OTS Defendants are qualifiedly immune from the underlying claim. *See Mowbray, 274 F.3d at 280.*

Civil Action No. 3:99-CV-1989-M

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

JOHN H. CARNEY, et al.,
Plaintiffs,

v.

USA, et al.,
Defendants.

March 31, 2003, Decided
March 31, 2003, Filed

JUDGES: BARBARA M. G. LYNN, UNITED STATES DISTRICT JUDGE.

OPINIONBY: BARBARA M. G. LYNN

OPINION:

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Court has under consideration the Findings and Recommendation of United States Magistrate Judge Irma Carrillo Ramirez on the Motion to Dismiss Defendant United States of America, filed April 26, 2002 (# 145); the Motion to Dismiss Defendant Federal Bureau of Investigation, filed May 14, 2002 (# 148); Defendant Edward Kraemer's Motion to Dismiss, filed May 15, 2002 (# 154); and Defendants Richard A. Kamp,

Pamela L. Dempsey, and Jack Hinton's [*2] Motion to Dismiss, filed May 15, 2002 (# 152). Objections were filed, and the District Court has made a *de novo* review of those portions of the proposed Findings and Recommendation to which objection was made. The objections are overruled, and the Court accepts the Findings and Recommendation of the United States Magistrate Judge. However, the Court wishes to elaborate further on the issue of whether as to Defendants Kraemer, Hinton, Dempsey, and Kamp (the "Individual Defendants") the limitations period is tolled by Texas's fraudulent concealment doctrine.

Plaintiffs object that their claims do not accrue "under federal law[,] in a *Bivens* action[,] until the plaintiff acquires possession of two critical facts: (1) an injury has occurred; and (2) the identity of the person who inflicted the injury." Obj. at 9 (citing *Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir. 1980))*. Plaintiffs allege that because the identities of the Individual Defendants were "concealed" until November 2, 2002, the statute of limitations was tolled by Texas's fraudulent concealment doctrine. *Id.*

Two elements are necessary to show fraudulent concealment: (a) actual knowledge [*3] by the defendant that a wrong has occurred, and (2) a fixed purpose to conceal the facts necessary for the plaintiff to know that the plaintiff has a cause of action. *See Heller Healthcare Finance, Inc. v. Boyes*, 2002 U.S. Dist. LEXIS 12755, 2002 WL 1558340, at *5 (N.D. Tex. July 15, 2002) (Fitzwater, J.) (citing *Santanna Natural Gas Corp. v. Hamon Operating Co., 954 S.W.2d 885, 890 (Tex. App.- Austin 1997, pet. denied))*; *Prieto v. John Hancock Mut. Life Ins. Co., 132 F. Supp. 2d 506, 515-16 (N.D. Tex. Jan. 12, 2001)* (Lindsay, J.) (citing

Santanna, 954 S.W.2d 885). With regard to fraudulent concealment of a party's identity, the general rule in Texas was stated in the early case of *Griffith v. Shannon, 284 S.W. 598, 600 (Tex. App. - Austin 1926, writ dism'd)*: "Fraud and concealment, in order to prevent the running of the statute, must relate to concealment of the cause of action and not to the concealment of the parties." Texas courts have consistently followed this rule. See also *Vaughn v. Sturm-Hughes, 937 S.W.2d 106, 110 (Tex. App.-- Ft. Worth 1997, writ denied)* (finding that where the cause of action was not [*4] concealed, the alleged failure to disclose the identity of the driver at the time of the accident did not toll limitations); *Burns v. Thomas, 790 S.W.2d 1, 2 (Tex. App-Amarillo 1988)* ("reiterating that fraud and concealment, in order to prevent the running of the statute, must relate to the concealment of the cause of action and not to the concealment of the parties."), *rev'd on other grounds, 786 S.W.2d 266, 267, 33 Tex. Sup. Ct. J. 353 (Tex. 1990)*; *Otis v. Scientific Atlanta, Inc., 612 S.W.2d 665, 666 (Tex. App.-Dallas 1981, writ ref' d.n.r.e)* (finding no authority for the proposition that in Texas, concealment of one's identity tolls the running of the statute of limitations on a cause of action against that person).

However, courts have recognized an exception to the general rule where a party affirmatively conceals the responsible party's identity, if a duty to disclose exists. *Barnhill v. Integrated Health Services, Inc., 21 S.W.3d 321 (Tex. App.-- San Antonio 1999, no writ)* (citing *Cherry v. Victoria Equipment & Supply, Inc., 645 S.W.2d 781, 782, 26 Tex. Sup. Ct. J. 215 (Tex. 1983))*; *Dougherty v. Gifford, 826 S.W.2d 668, 674 (Tex. App. [*5] -- Texarkana 1992, no writ)* (citing *Cherry, 645*

S.W.2d 781, 26 Tex. Sup. Ct. J. 215). In *Barnhill*, an employee sued his employer for negligence arising out of a workplace injury. *21 S.W.3d at 323*. Texas law required the employer to post a notice in the workplace regarding the existence of workers' compensation insurance coverage and to identify itself in the notice. *Id. at 324*. The employer's notice misidentified the true employer. *Id.* Finding that Texas law imposed a duty to disclose the employer's identity, and that a genuine issue of material fact existed regarding whether the employer fraudulently concealed its identity to escape suit, the court reversed the trial court's entry of summary judgment for the employer. *Id.*

In *Dougherty*, a patient was misdiagnosed with cancer and underwent chemotherapy and radiation treatments. *826 S.W.2d at 672*. The jury found negligence as well as fraudulent concealment of the negligent pathologists' identity, and the defendant pathologists appealed. *Id.* In considering the defendants' challenge to the sufficiency of the evidence supporting fraudulent concealment, the *Dougherty* court expressly [*6] relied upon the Texas Supreme Court's decision in *Cherry, 645 S.W.2d 781, 26 Tex. Sup. Ct. J. 215*. In *Cherry*, the plaintiffs were injured when a gas holding tank on the well they were cleaning ignited. *Id. At 782*. During his deposition, which was taken prior to the expiration of limitations, a fifty-percent co-owner of an equipment and supply company repeatedly disavowed any involvement by his company with the well. *Id.* After the statute of limitations expired, the plaintiffs discovered that the company did in fact do work on the well in question. *Id.* The Texas Supreme Court held that the deposition testimony raised an issue of fact as to fraudulent concealment,

which defeated the company's motion for summary judgment based upon limitations. *Id.*

The *Dougherty* court interpreted *Cherry* as "standing for the principle that the nature of the parties' relationship controls the duty of disclosure. Thus, a party responding under oath is under a higher duty to disclose than someone in a negotiation process." *826 S.W.2d at 674.* The *Dougherty* court found that a higher duty to disclose likewise existed in a physician/patient relationship. *Id.* [*7] Finding that the defendant pathologists had a physician/patient relationship with the plaintiff patient, and that the pathologists' silence, in the face of a duty to disclose, was an act of concealment, the court held that the jury finding of fraudulent concealment was supported by legally and factually sufficient evidence. *Id. at 674-676. Compare Vaughn, 937 S.W.2d at 110* (finding no evidence of a special relationship between plaintiff and defendant's insurer that would justify imposing a duty on the insurer to disclose the identity of its insured).

The foregoing cases demonstrate that absent concealment of a plaintiff's cause of action, concealment of the responsible party's identity does not toll limitations unless a party conceals the responsible party's identity where a duty to disclose is imposed by law or by virtue of a special relationship. In this case, at least as of the date of their acquittals on October 3, 1997, Plaintiffs knew they had a *Bivens* claims for the unlawful withholding of *Brady* material. They timely asserted these claims, which are the same claims they now assert against the Individual Defendants. (Third Am. Compl. [*8] At 3, 5, 7-9, 33, 52, 65-66, 69, 71 74.) Thus, it is indisputable there was no concealment of the cause of action. Plaintiffs have not alleged that any

party affirmatively acted to conceal the identity of the Individual Defendants. Plaintiffs have also not alleged that any party owed them a duty to disclose their identities; nor does it appear that the law or any special relationship imposes such a duty in this case. Accordingly, the fraudulent concealment doctrine does not save Plaintiffs' untimely claims.

In their Objections, Plaintiffs cite the Fifth Circuit opinion in *Lavellee* to argue that, "until the plaintiff is in possession of the 'critical facts that he has been hurt and who has inflicted the injury,' the statute of limitations does not commence to run." *Lavellee, 611 F.2d 1131.* However, *Lavellee* was a discovery rule case, not a fraudulent concealment case. Indeed, for that proposition, *Lavellee* quoted the Supreme Court's opinion in another discovery rule case. *Id.* (quoting *United States v. Kubrick, 444 U.S. 111, 122, 62 L. Ed. 2d 259, 100 S. Ct. 352* n1, *444 U.S. 111, 62 L. Ed. 2d 259, 100 S. Ct. 352 (1979)).* Recently, the Supreme Court clarified that it was discussing [*9] the discovery rule in *Kubrick,* not the fraudulent concealment doctrine. *See TRW Inc. v. Andrews, 534 U.S. 19, 27, 151 L. Ed. 2d 339, 122 S. Ct. 441 (2001)* ("The only other cases in which we have recognized a prevailing discovery rule ... were decided in two contexts, latent disease and medical malpractice, 'where the cry for [such] rule is loudest,'" (citing *Kubrick, 444 U.S. at 122*)). "Unlike the discovery rule, which determines when the cause of action accrues for purposes of determining when limitations begin to run, the doctrine of fraudulent concealment tolls or suspends the running of the limitations after it has begun because the defendant concealed from the plaintiff facts necessary for the plaintiff to know that he or she had a cause of action."

Achee v. Port Drum Co., 197 F. Supp. 2d 723, 737 (E.D. Tex. 2002). While courts sometimes confuse the two rules, n2 under the standard for fraudulent concealment, Plaintiffs' knowledge of their cause of action was enough to start the running of the statute of limitations, which would not be tolled absent affirmative acts to conceal the identities of the Individual Defendants, [*10] and a duty to disclose. Plaintiffs' reliance on *Lavellee* is thus misplaced.

Despite their lack of knowledge of the identities of the Individual Defendants, Plaintiffs were indisputably aware of their cause of action by October 3, 1997. Because Plaintiffs do not allege any affirmative acts to conceal the identities of the Individual Defendants or a duty to disclose imposed by law or a special relationship, the doctrine of fraudulent concealment does not toll limitations.

The Motions to Dismiss Defendants United States of America, Federal Bureau of Investigation, [*11] Edward Kraemer, Richard A. Kamp, Pamela L. Dempsey, and Jack Hinton are GRANTED.

SO ORDERED this 31 day of March, 2003.

BARBARA M. G. LYNN

UNITED STATES DISTRICT JUDGE

JUDGMENT

The Court has entered its Findings in the case, accepting the Findings and Recommendation of the Magistrate Judge. Therefore,

It is ORDERED, ADJUDGED and DECREED that Defendants United States of America, Federal Bureau of Investigation, Edward Kraemer, Richard A. Kamp,

Pamela L. Dempsey, and Jack Hinton are DISMISSED, and all costs are taxed against Plaintiffs.

It is further ORDERED that the Clerk shall transmit a true copy of this Judgment, together with a true copy of the Order Accepting the Findings and Recommendation of the United States Magistrate Judge, to the parties.

SIGNED this 31 day of March, 2003.

BARBARA M. G. LYNN

UNITED STATES DISTRICT JUDGE

Footnote

n1 The Fifth Circuit's opinion attributes the quote to *Kubrick, 444 U.S. at 121 n.8. Lavellee, 611 F.2d at 1131.* The exact language quoted actually appears in the main text on page 122.

n2 The *Achee* court remarked that conflating the two doctrines is common, and "that courts often confuse the application of fraudulent concealment with that of the discovery rule[.]" *Achee, 197 F. Supp. 2d at 737.*

Civil Action No. 3:99-CV-1989-M

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

JOHN H. CARNEY, et al.,
Plaintiffs,

v.

USA, et al.,
Defendants.

December 4, 2002, Decided
December 5, 2002, Filed; December 6, 2002, Entered

JUDGES: IRMA CARRILLO RAMIREZ, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY: IRMA CARRILLO RAMIREZ

OPINION:

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the District Court's Special Order No. 3-214, filed September 11, 2002, the **Motion to Dismiss Defendant United States of America**, filed April 26, 2002, the **Motion to Dismiss Defendant Federal Bureau of Investigation**, filed May 14, 2002, **Defendant Edward Kraemer's Motion to Dismiss**, filed May 15, 2002, and **Defendants Richard A. Kamp, Pamela L. Dempsey, and Jack Hinton's Motion to Dismiss**, filed May 15, 2002, were transferred from the

docket of U.S. Magistrate Judge Jeff Kaplan to the docket of this Court for findings and recommendation pursuant to *28 U.S.C. § 636*(b). The motions are now before the Court, have been fully briefed, and are ripe for determination. [*3]

After thoroughly reviewing the record, the parties' arguments, and the applicable law, the Court is of the opinion that each motion to dismiss should be **GRANTED.**

I. BACKGROUND

A. Facts

This case arises out of the March 22, 1995 prosecution and conviction of John H. Carney and James R. Fisher ("Plaintiffs") for bank fraud, mail fraud, wire fraud, conspiracy, and making false statements to government officials. Plaintiffs appealed, and on February 13, 1997, the Fifth Circuit Court of Appeals reversed their convictions, vacated their sentences, and remanded the case for a new trial. *See United States v. Fisher, 106 F.3d 622 (5th Cir. 1997).* On October 3, 1997, Plaintiffs were retried and acquitted of all charges (except bank fraud, which had been dropped before trial). Plaintiffs then jointly brought this action against the United States, several federal agencies, and individual federal employees.

Plaintiff Carney, who is proceeding *pro se*, is an attorney who has been licensed by the State of Texas since 1981. Plaintiff Fisher is represented by counsel. Together, they have filed four lengthy complaints, culminating in their Third Amended [*4] Complaint, which primarily alleges that the defendants conspired to withhold exculpatory evidence. Additionally,

Plaintiffs claim that the defendants committed, used, and suborned perjury, and otherwise engaged in prosecutorial misconduct.

B. Procedural History

The procedural history of this case is long and convoluted. On September 3, 1999, Plaintiffs filed this suit alleging constitutional and common law tort claims against the United States, the Office of Thrift Supervision ("OTS"), the Federal Bureau of Investigation ("FBI"), and federal employees in their official and individual capacities. (Orig. Compl. at 1-2). On November 1, 1999, the OTS moved to dismiss. On November 3, 1999, the remaining defendants filed a collective motion to dismiss that included a Department of Justice certification that all federal employees were acting within the scope of their employment and the United States should be substituted as the proper defendant. n1 (Defs. Mot. Dis. at App. A.) On December 6, 1999, Plaintiffs filed a response. The same day, they filed their First Amended Complaint, which omitted the United States from the caption and introductory paragraph. (First Am. Compl. [*5] at 1, 3.)

On September 12, 2000, U.S. Magistrate Judge Jane Boyle held a hearing on the motions. During the hearing, the Court determined that Plaintiffs' claims accrued no later than the date of their acquittals, October 3, 1997. (Tr. at 68, 70-71.) The Court also stated that it would recommend that, under the Westfall Act, the United States would be substituted as the proper defendant [*6] with regards to Plaintiffs' common-law tort claims against the Individual Defendants, and those claims would be dismissed against the individuals. (Tr. at 64-5.) Regarding the claims against the FBI,

counsel for the FBI agreed with the Court that it had moved for dismissal under *Federal Rule of Civil Procedure 12(b)(6)*. (Tr. at 36.) In light of that understanding, the Court stated that it would recommend to the District Court that all constitutional claims and common-law tort claims against the FBI be dismissed, but that the expungement claim would remain. (Tr. at 39-40.) The Court also recommended that all claims against the OTS be dismissed on grounds of sovereign immunity, failure to exhaust administrative remedies under the Federal Tort Claims Act, and the statutory preclusion of this type of suit against the OTS. n2 (Tr. at 104.) The Court issued a written recommendation to that effect on September 13, 2000. (Mag. Rec. at 1, 6.) On January 8, 2001, the District Court adopted the recommendation and entered judgment accordingly. (D.J. at 1.) Meanwhile, Plaintiffs had presented their administrative claims to the FBI on December 20, 2000, and to the OTS on December 22, 2000.

Over ten months later, on October 15, 2001, Plaintiffs filed their Second Amended Complaint renaming the United States as a defendant and joining Richard Kamp, Pamela Dempsey, and Jack Hinton, who were Department of Justice employees, as defendants. (Sec. Am. Compl. at 1, 3.) On December 21, 2001, the United States filed its second motion to dismiss, which was dismissed without prejudice when Plaintiffs were granted leave to file their Third Amended Complaint. Plaintiffs filed that complaint on April 5, 2002, adding claims against Edward Kraemer, an OTS employee. (Third Am. Compl. at 1.) Subsequently, the United States renewed its motion to dismiss, Kraemer filed his own motion to dismiss, and Kamp, Dempsey, and

Hinton filed their collective motion to dismiss. On May 23, 2002, in accordance with the Westfall Act, the Court filed an Agreed Order substituting the United States for Kraemer, Kamp, Dempsey, and Hinton ("Individual Defendants") on all common-law tort claims against them, leaving them liable for only constitutional torts.

The United States moves to dismiss Plaintiffs' common-law tort claims, arguing that Plaintiffs failed to exhaust administrative remedies under the [*8] Federal Tort Claims Act. The Individual Defendants move to dismiss the constitutional tort claims, arguing qualified immunity and that Plaintiffs' claims are time-barred under the two-year statute of limitation. The United States moves to dismiss the constitutional torts against it because of sovereign immunity. Finally, the FBI moves to dismiss Plaintiffs' expungement claim for lack of standing.

II. ANALYSIS

A. Legal Standards for Dismissal

1. Federal Rule of Civil Procedure 12(b)(1)

Under Rule 12(b)(1), a claim is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the claim. *Home Builders Assoc., Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998).* A motion to dismiss may *facially* or *factually* attack the complaint's basis for subject matter jurisdiction. *Patterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. 1998).* A *facial* attack usually occurs early in the proceedings and it directs the court's attention to only "the sufficiency of the allegations in the complaint[,]

because they are presumed to be true." *Id.* If sufficient, [*9] those allegations alone provide jurisdiction.

In contrast, a *factual* attack challenges the existence of subject matter jurisdiction in fact irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, may be considered. *Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980).* Moreover, a factual attack may occur at any stage of the proceedings. *Id.* No presumptive truthfulness attaches to the plaintiff's allegations, the plaintiff bears the burden of proving that jurisdiction exists, and the presence of disputed material facts will not preclude the trial court from evaluating, for itself, the merits of jurisdictional claims. *Williamson v. Tucker, 645 F.2d 404, 412-413 (5th Cir. 1981)* ("Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.")

2. Federal Rule of Civil Procedure 12(b)(6)

Rule 12(b)(6) motions to dismiss are disfavored and rarely granted. *Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981).* [*10] As opposed to a factual attack under Rule 12(b)(1), under this standard, a court cannot look beyond the face of the pleadings. *Baker, 75 F.3d at 196; Spivey v. Robertson, 197 F.3d 772, 774 (5th Cir. 1999), cert. denied, 530 U.S. 1229 (2000).* To avoid dismissal, those pleadings must show specific, well-pleaded facts, not mere conclusory allegations. *Guidry v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992).* The court must accept those well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Baker*

v. Putnal, 75 F.3d 190, 196 (5th Cir. 1996). A court cannot dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson, 355 U.S. 41, 45-6, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995).* "The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. [*11] " *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).*

B. Common-Law Torts: The Federal Tort Claims Act

The United States moves, under Rule 12(b)(1), for dismissal of Plaintiffs' common-law tort claims for malicious prosecution, abuse of process, false imprisonment, gross negligence, and spoliation of evidence. (Defs. Br at 1.) The United States contends that the Court lacks subject matter jurisdiction over Plaintiffs' claims because Plaintiffs failed to timely exhaust their administrative remedies under the Federal Tort Claims Act ("FTCA"). Deciding this issue requires the Court's resolution of disputed factual matters outside the pleadings -- such as facts bearing on whether Plaintiffs' were required to present their claims before or after the United States' substitution. Therefore, the United States' motion is a *factual* attack, and the Court may consider matters outside the pleadings. *See Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001); see also Williamson, 645 F.2d at 412-413.*

The Federal Tort Claims Act, *28 U.S.C. § 2671, et. seq.*, provides a limited waiver of the United States' [*12] sovereign immunity for tort claims brought against the federal government. *United States v. Kubrick, 444 U.S. 111, 123-24, 62 L. Ed. 2d 259, 100 S. Ct. 352 (1979); Rayonier, Inc. v. United States, 352 U.S. 315, 319, 1 L. Ed. 2d 354, 77 S. Ct. 374 (1956); McGuire v. Turnbo, 137 F.3d 321, 324 (5th Cir. 1998).* The waiver's express and specific terms define the Court's subject matter jurisdiction. *Honda v. Clark, 386 U.S. 484, 18 L. Ed. 2d 244, 87 S. Ct. 1188 (1967); United States v. Sherwood, 312 U.S. 584, 586, 85 L. Ed. 1058, 61 S. Ct. 767 (1941)* ("The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.") (citations omitted).

Under the FTCA's specific terms, the Court lacks subject matter jurisdiction "unless the claimant shall have first presented his claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." *28 U.S.C. § 2675*(a); *Williamson v. United States Dept. of Agriculture, 815 F.2d 368, 378 (5th Cir. 1987).* It is well-settled that compliance with the FTCA's [*13] administrative-claim process is a jurisdictional prerequisite to suit against the federal government. *Shah v. Quinlin, 901 F.2d 1241, 1243 (5th Cir. 1990) (citing Gregory v. Mitchell, 634 F.2d 199, 203-04 (5th Cir. 1981)); Murphy v. Mayfield, 860 F. Supp. 340, 342 n. 5 (N.D. Tex. 1994).* Only when the claim has been denied or six months have passed may the plaintiff bring suit. *See, e.g., Price v. United States,*

69 F.3d 46, 54 (5th Cir. 1995); McAfee v. 5th Circuit Judges, 884 F.2d 221, 222-23 (5th Cir. 1989).

1. Two-Year Limitation Period: *28 U.S.C. § 2401*(b)

Under the FTCA, a common-law tort claim against the United States "shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after the claim accrues ..." *28 U.S.C. § 2401*(b); *see also Ramming, 281 F.3d at 162.* According to the Court's earlier findings, Plaintiffs' claims accrued against defendants on October 3, 1997. (Tr. at 68, 70-1.) Thus, pursuant to § 2401(b), Plaintiffs had until October 3, 1999, to present their claims [*14] for administrative consideration. *Ramming, 281 F.3d at 162-3* (determining that the two-year limitation in § 2401(b) began when the claim accrued against a known federal presence). However, the record reflects that Plaintiffs did not submit their administrative claim to the FBI until after the two-year period expired, on December 20, 2000. Indeed, Plaintiffs admit that they failed to satisfy § 2401(b). (Third. Am. Compl. at 53) ("Plaintiffs did not send a [sic] FTCA demand prior to filing the lawsuit[.]") Moreover, the Court already noted that the common-law tort claims against the United States could not stand "because of the plaintiffs' failure to exhaust their administrative remedies under the FTCA." (Mag. Find. at 6.) Consequently, Plaintiffs failed to timely submit their claims under the FTCA's two-year limitation.

In response, Plaintiffs argue that the filing of their Original Complaint "satisfied all notice requirements to the FBI and OS [sic] under the FTCA and that notice was timely." (Third. Am. Compl. at 53) (footnote

omitted). However, this argument is foreclosed by settled precedent. *McNeil v. United States, 508 U.S. 106, 112, 124 L. Ed. 2d 21, 113 S. Ct. 1980 (1993)* ("Congress intended [*15] to require complete exhaustion of Executive remedies before invocation of the judicial process"); *see also Houston v. U.S. Postal Serv., 823 F.2d 896, 901 (5th Cir. 1987)* (citing with approval Eighth and Fourth Circuit Courts of Appeals opinions rejecting arguments similar to Plaintiffs').

2. Sixty-Day Exception: *28 U.S.C. § 2679*(d)(5)

Plaintiffs further contend that they timely submitted their claims under *28 U.S.C. § 2679*(d)(5). Section 2679(d)(5) is a limited, sixty-day exception to the general two-year limitation period. It states in relevant part:

> Whenever an action ... in which the United States is substituted as a party defendant ... is dismissed [for failure to exhaust administrative remedies], such a claim shall be deemed timely presented under 2401(b) of this title if ... presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

28 U.S.C. § 2679(d)(5)(B). Plaintiffs argue that they timely presented their administrative claims within sixty days of learning that the United States would be substituted for the Individual Defendants. [*16] n3

Generally, the courts that have addressed this issue have held that the sixty-day exception applies only to a claimant who files suit against a defendant while uninformed of the defendant's federal status. *See*

Bryant v. United States, 96 F. Supp. 2d 552, 553-554 (N.D. Miss. 2000) (clarifying that § 2679(d)(5) applies in cases where the plaintiff has "no knowledge of a federal presence" and "to actions which are not *originally brought* against the United States.") (emphasis added); *accord Faura Cirino v. United States, 210 F. Supp. 2d 46, 53 (D. Puerto Rico 2002)* (same). The uninformed claimant is [*17] obviously unaware of the need to present his administrative claim within the two-year limitation. The sixty-day exception saves the claimant from the dismissal that may otherwise occur once the United States is substituted into the suit after the two-year limitation expires. The exception does not, however, save claims originally brought against the United States or a known federal opposition. *See Houston, 823 F.2d at 902* (discussing a similar situation and holding that "the plaintiff--at least one who knows or should know that the driver was a government employee--must meet the FTCA's administrative exhaustion requirements and then timely commence suit against the government as provided by *28 U.S.C. § 2401*(b)").

The record reflects that not only did Plaintiffs know of the Individual Defendants' federal status, but Plaintiffs purposefully directed their claims against federal employees, federal agencies and the United States. First, it is undisputed that Plaintiffs sued government employees in their federal capacities. (Orig. Compl. at 1-2; Sec. Am. Compl. at 3; Third Am. Compl. at 3.) ("This is a federal constitutional tort action against [*18] the United States of America, named government officers, and known and unknown agents of the Department of Justice...") This alone forecloses relief under the sixty-day exception. *See McGuire, 137*

F.3d at 324 (stating that the "FTCA ... is the exclusive remedy for a federal employee's tortious acts committed in the scope of employment."); *accord Artis v. Petrovsky, 638 F. Supp. 51, 53 (W.D.Mo. 1986)* (explaining that it is superfluous to sue federal employees in their official capacities and concluding that "the statutory provisions of the FTCA cannot be avoided by naming officers and employees of the United States as defendants.").

Second, the substance of Plaintiffs' claims appear directed at the United States, itself. (First Am. Compl. at 18) (alleging that a grand jury witness's testimony "was false, that *Government* knew it was false, and it was material.") (emphasis added, footnote omitted); *Id.* at 20 (stating that "the *Government* lacked sufficient grounds for ~~charging and~~ convicting plaintiffs.") (emphasis added); *Id.* at 21 (adding that the "*government*, through unknown agents of the DOJ, Fazio [sic], Gant and OTS employee [*19] Colburn conspired to investigate, structure and construct the knowing perjured testimony with the express purpose of obtaining a conviction.") (emphasis added); *Id.* at 22 (alleging that the "*government* encouraged Courage to testify falsely about the following issues; made no effort to correct the falsehood for the jury and did so knowing the truth withheld was highly exculpatory.") (emphasis added). Plaintiffs reallege these allegations in their substantive claims. *Id.* at 28, n4 49.

As the bulk of Plaintiffs' complaints demonstrates, not only were Plaintiffs aware of the defendants' federal statuses, but they levied claims directly against the government. Therefore, the sixty-day exception does not save Plaintiffs' late claims. Plaintiffs respond

that equitable tolling be applied to render their late presentations timely.

3. Equitable Tolling

Plaintiffs request that their claims against the [*20] United States be equitably tolled under Texas' fraudulent concealment doctrine. (Pls. Br. at 37.) "The doctrine of equitable tolling preserves a plaintiff's claims when strict interpretation of the statute of limitations would be inequitable." *Lambert v. United States, 44 F.3d 296, 298 (5th Cir. 1995).* However, equitable tolling is not a doctrine that courts use whenever they please; statutes of limitation serve a vital role in blocking stale claims. *Perez v. United States, 167 F.3d 913, 919 (5th Cir. 1999).* Therefore, federal courts typically extend equitable tolling relief only sparingly. *Irwin v. Dept. Veteran's Affairs, 498 U.S. 89, 96, 112 L. Ed. 2d 435, 111 S. Ct. 453 (1990).* The plaintiff bears the burden of proving that strict interpretation of the statute of limitations would be inequitable. *FDIC v. Shrader & York, 991 F.2d 216, 220 (5th Cir. 1993).*

The "doctrine of fraudulent concealment tolls or suspends the running of limitations after it has begun because the defendant concealed from the plaintiff facts necessary for the plaintiff to know that he or she had a cause of action." *Achee v. Port Drum Co., 197 F. Supp. 2d 723, 737 (E.D. Tex. 2002).* [*21] At issue is whether there was a fraud and whether the plaintiff exercised due diligence in pursuing the facts that would disclose the fraud. *Id.* The applicable statute of limitations is tolled until the fraud is discovered or could have been discovered in the exercise of reasonable diligence. *Id.; Love v. National Medical Enterprises, 230 F.3d 765,*

779 (5th Cir. 2000). In asserting a claim of fraudulent concealment, the plaintiff must show that the defendant had a duty to disclose and that he breached that duty by fraudulently concealing the existence of a cause of action. *Seatrax, Inc. v. Sonbeck Intern, Inc., 200 F.3d 358, 366 (5th Cir. 2000).* There is no fraudulent concealment of facts that were or should have been known by the plaintiff. *Thomas v. Barton Lodge II, Ltd., 174 F.3d 636, 646 (5th Cir. 1999).*

Plaintiffs were aware of the facts essential to determining that they had a cause of action against the United States on October 3, 1997, or earlier. Indeed, Plaintiffs filed suit against the United States within the two-year statute of limitation. Further, Plaintiffs have provided no evidence of fraudulent concealment of [*22] their causes of action by the United States. In light of this, the Court is "not free to construe § 2401(b) so as to defeat its obvious purpose of encouraging the prompt presentation of claims." *Ramming v. United States, 281 F.3d 158, 163 (5th Cir. 2001).* Therefore, this argument fails and Plaintiffs' common-law tort claims against the United States should be dismissed with prejudice.

C. Constitutional Tort Claims

1. United States

Plaintiffs also raise constitutional tort claims against the United States. (Third Am. Compl. at 3.) Plaintiffs' constitutional tort claims against the United States are foreclosed by settled precedent. *See FDIC v. Meyer, 510 U.S. 471, 475, 127 L. Ed. 2d 308, 114 S. Ct. 996 (1994)* (explaining that "the United States simply has not rendered itself liable under § 1346(b) [of the FTCA] for constitutional tort claims."); *see also*

Sanchez v. Rowe, 870 F.2d 291, 295 (5th Cir. 1989) (agreeing "with the Second and Eleventh Circuits that suits for violations of federal constitutional rights, even though tortious in nature, are not within the scope of the FTCA"). Plaintiffs' constitutional claims against the United States [*23] should be dismissed with prejudice.

2. Individual Defendants

Plaintiffs also raise constitutional claims, or *Bivens* n5 claims, against the Individual Defendants. The Individual Defendants have moved to dismiss Plaintiffs' claims as time-barred. n6 The statute of limitations for constitutional tort claims is controlled by borrowing the applicable state statute of limitations; in Texas, the limitations period is two years. *Brown v. Nationsbank Corp., 188 F.3d 579, 590 (5th Cir. 1999).* As stated above, Plaintiffs' causes of action accrued when they were acquitted on October 3, 1997. However, Plaintiffs did not name Kamp, Dempsey, and Hinton until they filed their Second Amended Complaint on October 15, 2001 -- four years and twelve days after their claims accrued. Plaintiffs did not name Kraemer until they filed their Third Amended Complaint almost six months after that, on April 5, 2002. Thus, the statute of limitations had clearly run by the time Plaintiffs sued the Individual Defendants and Plaintiffs' claims against them are time-barred.

3. Equitable Tolling

As with the FTCA claims against the United States, Plaintiffs request that their claims against the Individual Defendants be tolled by Texas' fraudulent concealment doctrine. In addition, Plaintiffs request tolling according to Texas' discovery rule.

a. Fraudulent Concealment

Plaintiffs argue that tolling is proper according to the fraudulent concealment doctrine because they did not learn of the individuals' specific involvement in withholding exculpatory information until November 2, 2000. The Individual Defendants had a duty to disclose exculpatory material. However, Plaintiffs were aware of their causes of action for this concealment on the date of their acquittals, October 3, 1997, or earlier. Although Plaintiffs may have been unaware of the Individual Defendant's specific involvement on that date, Plaintiffs knew the facts essential to determining that they had a cause of action. [*25] Therefore, there was no fraudulent concealment that would toll the statute of limitations.

b. Discovery Rule

Additionally, Plaintiffs request equitable tolling against the Individual Defendants under Texas' discovery rule. Assuming that the discovery rule even applies to *Bivens* claims, it does not apply on these facts. Unlike the fraudulent concealment doctrine, Texas' discovery rule tolls the limitations period until such time as the plaintiff has "knowledge of facts which would cause a reasonable person to make inquiry to determine his or her legal rights." *Vaught v. Show Denko K.K., 107 F.3d 1137, 1141 (5th Cir. 1997).* Once a plaintiff discovers or, in the exercise of reasonable diligence, should have discovered the injury and that the injury was caused by another's wrongful acts, "limitations commences, even if the plaintiff does not know the exact identity of the wrongdoer." *Childs v. Houssecker, 974 S.W.2d 31, 40 (Tex. 1998).* The discovery rule does not "toll limitations periods until a

plaintiff discovers a specific cause of action against a specific defendant." *Vaught, 107 F.3d at 1142.* The party seeking the benefit [*26] of the discovery rule bears the burden of proving and securing favorable findings thereon. *Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 518, 32 Tex. Sup. Ct. J. 99 (Tex. 1988).*

The discovery rule operates to toll a limitation period that expired while the claimant was unaware of a specific injury, regardless of whether she was unaware of a specific defendant. Here, Plaintiffs knew of their specific injuries on October 3, 1997. Also on that date, they knew that their injuries were caused by others' wrongful acts. Therefore, Plaintiffs had nothing to later "discover" within the meaning of the discovery rule. Accordingly, equitable tolling of Plaintiffs' claims would be inappropriate. Because neither the discovery rule nor fraudulent concealment are applicable to Plaintiffs' claims, equitable tolling is inappropriate. Consequently, Plaintiffs' constitutional tort claims are time-barred and should be dismissed with prejudice.

D. Rule 15(c): Relation Back

In a final attempt to make their claims timely, Plaintiffs assert that all amendments in their second and third amended complaints relate back to the time of the filing of the Original Complaint pursuant to *Federal Rule of Civil Procedure 15(c)* [*27] . Rule 15(c)(3) permits an amendment to relate back where the amendment names a party against whom a claim is asserted if (1) the claim arose out of the transaction, conduct, or occurrence set forth in the original complaint, (2) the party to be brought in has received such notice of the suit that the party will not be prejudiced, and (3) the party "knew or should have

known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." *Jacobsen v. Osborne, 133 F.3d 315, 320 (5th Cir. 1998).*

Under the first prong, it is undisputed that the claims against the Individual Defendants arose out of the same occurrences set forth in the Original Complaint. Under the second prong, the Individual Defendants received notice of the suit. Notice will be inferred if there is an identity of interest between the original defendant and the added defendant. *Jacobsen, 133 F.3d at 320.* Further, there is an identity of interest if the defendants "are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice [*28] of the litigation to the other." *Id.* Finally, "notice may be imputed to the new party through shared counsel." *Id.* Here, the Original Complaint named multiple employees of the OTS and FBI, as well as the agencies themselves. The Individual Defendants played a role in the investigation that provided the basis for the instant suit. Thus, there is an identity of interest between the agencies and the respective Individual Defendants. Accordingly, the Individual Defendants had notice of the litigation, and the second prong is satisfied.

Under the third prong, however, Plaintiffs' arguments fail. Plaintiffs allege that they were unaware of either the Individual Defendants' identity or specific involvement until after discovery commenced. However, Plaintiffs' claimed ignorance is not the type of "mistake" necessary for relation back. *Jacobsen, 133 F.3d at 320-21* (siding with other circuits that have held that "for a 'John Doe' defendant, there was no 'mistake'

in identifyi[illegible] the correct defendant; rather, the problem wa[illegible] being able to identify that defendant"); *accord Worthington v. Wilson, 8 F.3d 1253, 1257 (7th Cir. 1993); Wayne v. Jarvis, 197 F.3d 1098, 1103 (11th Cir. 1999).* [*29] Ultimately, Rule 15(c) does not allow relation back of the amendments if the reason Plaintiffs failed to name the Individual Defendants in the Original Complaint was because they did not know their identities or specific involvement. *See Jacobsen, 133 F.3d at 320-21.* Accordingly, Plaintiffs' claims do not relate back.

E. Expungement Claim

The FBI challenges Plaintiffs' standing on their expungement claim. (FBI Br. at 1-6.) Plaintiffs argue that the Court's earlier denial of the FBI's first motion to dismiss under Rule 12(b)(6) forecloses the FBI's jurisdictional challenge. However, it is well-settled that objections to jurisdiction may be raised at any time, even by the court, and they are not precluded by a previous Rule 12 defense. *See FED. R. CIV. P. 12(h)(3); see also Matter of Kutner, 656 F.2d 1107, 1100 (5th Cir. 1981).* Thus, the FBI's motion is not foreclosed.

There is a strong presumption against expungement, which is an "exceedingly narrow" remedy that is rarely granted. *Sealed Appellant, 130 F.3d 695 at 701; see also Rogers v. Slaughter, 469 F.2d 1084, 1085 (5th Cir. 1972).* In the context [*30] of criminal records, it is under rare circumstances that courts find expungement as the only available remedy. *See United States v. McLeod, 385 F.2d 734, 749-50 (5th Cir. 1967)* (finding that because the county ordered mass arrests only to harass and intimidate voters, the court was

empowered to "do all within its power to eradicate the effect of the unlawful prosecutions" including expunging county records); *accord Sullivan v. Murphy, 156 U.S. App. D.C. 28, 478 F.2d 938, 968-73* (D.C. Cir.) (discussing several expungement cases and ordering expungement to prevent dissemination of records of arrests where the arrests were without probable cause). To have standing to expunge executive branch records, a plaintiff "must assert a specific ... affirmative rights violation" to "an explicit constitutional or statutorily-created right ... by executive branch officers or agencies to justify the intrusion into the executive's affairs." *Sealed Appellant v. Sealed Appellee, 130 F.3d 695, 697 and 700 n. 12 (5th Cir. 1997) cert. denied, 523 U.S. 1077 (1998).* The injury must be "such that no other remedy would afford relief[;]" a mere showing of burden [*31] is insufficient. *Id. at 697.*

In the instant, even construing Plaintiffs' complaints and the additional allegations raised in Plaintiffs' brief as alleging affirmative rights violations, Plaintiffs' claims still fail to justify expungement for three reasons. First, a good deal of Plaintiffs' claimed violations are not tied to an explicit or statutorily-created right. For instance, Plaintiffs allege that the continued maintenance of their records could lead to adverse professional consequences and tarnishes "the names, reputations and the very identities of the wrongly accused beyond judicial repair." (Third Am. Compl. at 92). These allegations are not tied to an explicit constitutional or statutorily-created right and are thereby insufficient to warrant expungement. *Sealed Appellant, 130 F.3d at 701-02* (noting that granting expungement of executive branch records on

allegations of "employment availability, reputation in the community, and possible denial of professional licensing" was abuse of discretion). In their brief, Plaintiffs object to being named on "suspects lists" and argue that there "are no remedies available to remedy the inter-agency [*32] sharing of suspects list" between banks, regulatory agencies, and law enforcement agencies. (Pls. Br. at 43) (emphasis in original.) Even assuming that there is "a database of suspects," as they claim, Plaintiffs have failed to show how such information is being used to violate an explicit constitutional or statutorily-created right. *Sealed Appellant, 130 F.3d at 700.*

Second, expungement is not the only available remedy for violations to Plaintiffs' explicit constitutional or statutorily-created rights. Indeed, Plaintiffs have already pursued a multitude of other remedies against the FBI, the OTS, the United States, and the Individual Defendants. Moreover, for future violations, Plaintiffs "could assert a civil rights challenge [for] double jeopardy," maintain a *Bivens* action, or properly proceed under the FTCA. *See Sealed Appellant, 130 F.3d at 701.* Plaintiffs complain that their records prevent the purchase of a firearm. However, assuming that Plaintiffs' constitutional rights were therefore violated, federal regulations provide a means for correcting inaccuracies in the relevant records. *See 15 C.F.R. § 25.10(c)*-(f) [*33] . Other federal regulations provide ways to accurately amend other records that incorrectly reflect Plaintiffs' information. *See 28 C.F.R. § 16.96(o)(2)(i)* (specifying the means of amending records in the National DNA Index System.); *see also 28 C.F.R. § 20.34* (referring to the "procedures by which an individual may obtain a

copy of his or her identification record from the FBI to review and request any change, correction, or update..."). Therefore, expungement is not the only available remedy, and Plaintiffs have failed to assert a violation "that cannot be remedied by the relief otherwise provided for by the court or by Congress[.]" *Sealed Appellant, 130 F.3d at 699.*

In their last argument, Plaintiffs contend that the facts of their overturned convictions and subsequent acquittals justify expungement. (Third Am. Compl. at 92.) However, neither an overturned conviction nor an acquittal necessarily entitles Plaintiffs to expungement. *Sealed Appellant, 130 F.3d at 701 n.14; see also Rogers v. Slaughter, 469 F.2d 1084, 1085 (5th Cir. 1972)* (noting that such a remedy "gave [*34] the defendant more relief than if he had been acquitted.") Furthermore, even though Plaintiffs were acquitted, the FBI has executive discretion to maintain its records. *See Rogers, 469 F.2d at 1085* ("Public policy requires here that the retention of records of the arrest and of the subsequent proceedings be left to the discretion of the appropriate authorities.") The rationale for generally refusing to expunge arrest or indictment records is that an arrest or indictment has independent legal significance, insofar as it shows the existence of probable cause to believe that a defendant committed a crime, even when the government ultimately fails to prove guilt. *See United States v. Schnitzer, 567 F.2d 536, 540 (2nd Cir. 1977).* As a result, the government has an important interest in keeping a record of the arrest or indictment, even after an acquittal. *See United States v. Flagg, 178 F. Supp.2d 903, 905 (S.D. Ohio 2001).*

In sum, Plaintiffs fail to show a harm to "an explicit constitutional or statutorily-created right" that has as its only remedy expungement. Given this failure, and the FBI's important interest in maintaining its accurate [*35] files, Plaintiffs' request for expungement should be dismissed with prejudice.

III. Conclusion

For the reasons stated, the Court, having addressed and resolved the jurisdictional facts, has determined that it is without jurisdiction over Plaintiffs' common-law tort claims against the United States. Moreover, Plaintiffs' constitutional tort claims against the United States are foreclosed. Therefore, the Court recommends that the United States' motion to dismiss be **GRANTED** and that these claims be **DISMISSED** with prejudice.

The Court finds that Plaintiffs' constitutional tort claims against the Individual Defendants should be dismissed as time-barred. Accordingly, the Court recommends that the Defendant Edward Kraemer's Motion to Dismiss, and Defendants Richard A. Kamp, Pamela L. Dempsey, and Jack Hinton's Motion to Dismiss, be **GRANTED** and these claims be **DISMISSED** with prejudice.

The Court further finds that Plaintiffs are not entitled to the rare remedy of expungement. The Court recommends that the FBI's motion to dismiss be **GRANTED** and Plaintiffs' expungement claim be **DISMISSED** with prejudice.

SO RECOMMENDED. December 4th, 2002. [*36]

IRMA CARRILLO RAMIREZ

UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a copy of these findings and recommendation on all parties by mailing a copy to each of them. Pursuant to Title *28, United States Code, Section 636*(b)(1), any party who desires to object to these findings and recommendation must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. Failure to file written objections to the proposed findings and recommendation within ten days after being served with a copy shall bar the aggrieved party from appealing the factual findings, legal conclusions, and recommendation of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).*

IRMA CARRILLO RAMIREZ

UNITED STATES MAGISTRATE [*37] JUDGE

Footnotes

n1 Under authority granted by § 6 of the Federal Employees Liability Reform and Tort Compensation Act ("Westfall Act "), the Director of the Torts Branch of the Department of Justice certified that the each federal employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." *28 U.S.C. § 2679*(d)(1). Where such certification is made, the United States is substituted for the individual defendant and all common-law tort claims are then directed against the United States. *See United States v. Smith, 499 U.S. 160, 164 n.5, 113 L. Ed. 2d 134, 111 S. Ct. 1180 (1991).*

n2 *See 12 U.S.C. § 1464*(d)(1)(A).

n3 The United States argues that Plaintiffs' presentation was premature under the plain language of § 2679(d)(5) because Plaintiffs presented their claims before the District Court formally entered judgment substituting the United States for the Individual Defendants. Because the Court finds that § 2679(d)(5) does not apply here, the Court does not address this argument.

n4 Curiously, page 29 precedes page 28, but the paragraphs remain consecutively numbered throughout.

n5 In *Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971),* the Supreme Court recognized an implied private right of action for damages against federal officers alleged to have violated a citizen's constitutional rights.

n6 They also move to dismiss them on grounds of qualified immunity. Because the Court finds that

Plaintiffs' claims are time-barred, the Court does not address this argument.

Civil Action No. 3:99-CV-1989-M

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

JOHN H. CARNEY,
Plaintiffs,

v.

USA, et al., Defendants.

12/20/2004

ORDER

Based upon the briefing of Plaintiffs and Defendants filed on October 14, 2004, and October 28, 2004, respectively, filed in response to this Court's Order of September 30, 2004, and for the reasons stated in the Findings, Conclusion and Recommendations of the United States Magistrate Judge dated June 9, 2004, the Court grants Summary Judgment for the Defendants on Plaintiff's malicious prosecution claim, finding it to be a stand alone malicious prosecution claim, finding it to be a stand alone malicious prosecution claim, not tenable as a constitutional claim under Castellan v. Fargo, 352 F. 3d 939 (5th Cir. 2003). The Plaintiffs' Motion for Leave to Amend is DENIED as undid late and prejudicial in light of the age and status of this case.

Civil Action No. 3:99-CV-1989-M

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

JOHN H. CARNEY,
Plaintiffs,

v.

USA, et al., Defendants.

12/20/2004

FINAL JUDGMENT

Based on the Court's Order dated December 20, 2004 and the Court's Order on Findings, Conclusions and Recommendations of the United States Magistrate Judge, filed September 30, 2004, it is ORDERED, ADJUDGED and DECREED that Plaintiffs take nothing on their claims and all taxable court costs be paid by Plaintiffs.

Filed 6/8/06

No. 05-10198

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN H. CARNEY; JAMES R. FISHER,
Plaintiffs-Appellants,

Versus

UNITED STATES OF AMERICA; ET AL.,
Defendants,

UNITED STATES OF AMERICA; OFFICE OF THRIFT SUPERVISION; FEDERAL BUREAU OF INVESTIGATION, One or more unknown officials of the Department of Justice, Federal Bureau of Investigation; FRED TEED; ROLF D. COBURN, also known as Rolf Nordstrom; KAREN BRUTON; KEN KLEIN; RICHARD RICCABONO; VINCENT G. FAZZIO; JENNIFER GANT; BRAD LAMBERT; RICHARD H. KAMP; PAMELA I. DEMPSEY; JACK HINTON; EDWARD KRAMER,
Defendants-Appellees.

JUDGES: Before JONES, Chief Judge, and BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is Denied. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is Denied.

(2)

No. 06-328

FILED
OCT 10 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOHN H. CARNEY; JAMES R. FISHER,
Petitioners,

v.

UNITED STATES OF AMERICA ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR OTS RESPONDENTS IN OPPOSITION

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IN THE

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No. 06-328

JOHN H. CARNEY; JAMES R. FISHER,
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v.

UNITED STATES OF AMERICA ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR OTS RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is unreported. It is available electronically at 2006 WL 1307556 (5th Cir. May 9, 2006), and is reprinted in petitioners' appendix ("Pet. App.") at 1a-2a. The order denying petitioners' petition for rehearing is reprinted in petitioners' appendix at 79a-80a. The district court's December 20, 2004 final judgment dismissing the case is reprinted in petitioners' appendix at 78a. The district court's December 20, 2004 order granting summary judgment on petitioners' malicious prosecution claim is reprinted in petitioner's appendix at 77a. The district court's September 30, 2004 order dismissing all claims against the OTS Respondents except for petitioners' malicious prosecution claims is available electronically at 2004 WL 2250277 (N.D. Tex. Sept. 30, 2004), and is reprinted in petitioners' appendix

at 3a-6a. The June 9, 2004 findings, conclusions and recommendation of the magistrate judge that petitioners' action against the OTS Respondents be dismissed with prejudice is available electronically at 2004 WL 1285037 (N.D. Tex. Jun. 9, 2004), and is reprinted in petitioners' appendix at 7a-42a. The district court's March 31, 2003 order dismissing all claims against OTS Defendant Edward Kraemer is available electronically at 2003 WL 21653853 (N.D. Tex. Mar. 31, 2003), and is reprinted in petitioners' appendix at 43a-50a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed dismissal of petitioners' claims on May 9, 2006 (Pet. App. at 1a-2a.). The petitioners' petition for rehearing was denied by the Fifth Circuit on June 8, 2006 (Pet. App. at 79a-80a). The petition for a writ of certiorari was filed on September 6, 2006 and docketed on September 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Seven years ago, petitioners initiated a *Bivens*[1] action, suing several federal officials in their individual capacities, including Respondents Nordstrom, Bruton, Klein, Riccobono, Lambert, and Teed—all current or former employees of the Office of Thrift Supervision ("OTS Respondents"). The thrust of petitioners' claims was that they were improperly prosecuted by the United States Department of Justice ("DOJ") in the mid-1990s, resulting in the deprivation of their constitutional rights. With respect to the OTS Respondents, petitioners claimed, in essence, that these government employees caused an indictment to be issued against them, improperly withheld and suppressed exculpatory information, and either perjured themselves or suborned perjury during

[1] *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Plaintiffs' criminal trial. That trial resulted in petitioners' criminal convictions, in March 1995, for bank fraud, mail fraud, conspiracy, and making false statements.

In February 1997, the Fifth Circuit reversed petitioners' convictions on a number of grounds, including its conclusion that an FBI 302 witness statement constituted *Brady* [2] material that federal prosecutors should have provided to petitioners sooner. *See United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997). Petitioners subsequently were retried and acquitted on October 3, 1997. Two years later, on September 3, 1999, petitioners filed this action in the United States District Court for the Northern District of Texas.

In their initial complaint, petitioners alleged constitutional and common law tort claims against the United States, the OTS, the Federal Bureau of Investigation ("FBI"), and federal employees in their official and individual capacities. In November 1999, all Defendants filed motions to dismiss, and moved to substitute the United States as the exclusive defendant for all common law claims. One month later, petitioners filed their First Amended Complaint. After a hearing in September 2000, the assigned Magistrate Judge recommended that all of petitioners' common law tort claims against the individual defendants be dismissed. In January 2001, the district court adopted the Magistrate Judge's recommendation and entered judgment accordingly.

In September 2001, the district court granted petitioners leave to file a Second Amended Complaint, which specifically identified three previously unidentified DOJ employees as parties to the case. The United States moved to dismiss the Complaint asserting, *inter alia*, that the claims were time barred. To avoid dismissal, petitioners sought leave to file a Third Amended Complaint. The district court granted leave, but with the proviso that this would be petitioners'

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

final opportunity to amend. The court further admonished petitioners to consider carefully whether all of the named defendants properly belonged in the case, and to dismiss any improperly named defendants. Instead, in April 2002, petitioners filed a Third Amended Complaint in which they *added* an additional defendant, OTS employee Edward Kraemer.

In March 2003, the district court, adopting the recommendations of the Magistrate Judge, dismissed petitioners' claims against the newly added defendants based on limitations grounds.[3] In November 2003, the OTS Respondents moved for summary judgment on all remaining claims against them. In response to that motion, the Magistrate Judge permitted petitioners to take limited discovery in late 2003 and early 2004 in the form of deposition testimony. On September 30, 2004, the district court—again adopting the recommendations of the Magistrate Judge—dismissed all claims against the OTS Respondents with prejudice, except for petitioners' malicious prosecution claims, on which the court reserved judgment pending further briefing. On December 20, 2004 the district court entered final judgment in favor of the OTS Respondents, dismissing all of petitioners' claims and denying—as "und[uly] late and prejudicial in light of the age and status of this case"—one final request by petitioners for leave to file yet another Amended Complaint. Pet. App. at 77a.

In dismissing petitioners' claims against the OTS Respondents, the district court judge (Honorable Barbara Lynn) adopted the findings of the Magistrate Judge that, *inter alia*:

- Petitioners' allegations that the OTS Respondents withheld exculpatory evidence should be dismissed because each of the OTS Respondents was entitled to

[3] Petitioners do not appeal the dismissal of claims as to any of the newly added individual defendants, including Edward Kraemer.

qualified immunity, and, in any event, petitioners failed to identify any evidence, or demonstrate any personal knowledge, that any OTS agent withheld exculpatory evidence;

- Petitioners' perjury claims against OTS Respondents Nordstrom and Lambert should be dismissed because petitioners failed to identify any evidence that Nordstrom's or Lambert's testimony was false, or that any exception existed to their absolute immunity as trial witnesses;

- Petitioners' allegations that the OTS Respondents suborned perjury should be dismissed because each of the OTS Respondents was entitled to qualified immunity, and, in any event, petitioners failed to identify any evidence that the supposed perjured testimony was false or that the OTS Respondents knew of the testimony when it occurred.[4]

Petitioners appealed the district court's dismissal of their claims to the Fifth Circuit. On May 9, 2006, less than one week after hearing oral argument on petitioners' appeal, the court of appeals, "having carefully reviewed the parties' briefs and pertinent portions of the record in light of the parties' oral arguments," affirmed the final judgment of the district court "essentially for the reasons stated in its controlling opinions." Pet. App. at 2a.

ARGUMENT

The petition for certiorari should be denied. Petitioners contend that the Court should grant certiorari to review the dismissal of their claims against the OTS Respondents (a)

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[4] Judge Lynn also dismissed petitioners' malicious prosecution, supervisory liability, and failure to train claims against various OTS Respondents on a variety of grounds. Because petitioners do not appeal the dismissal of those claims, the OTS Respondents do not address them here.

because, they claim, the Fifth Circuit failed to conduct a *de novo* review of the district court's award of summary judgment; and (b) to resolve a purported conflict among the circuits on the issue of whether non-prosecutors may be held liable in a *Bivens* action for failure to produce *Brady* material to a criminal defendant.[5] Petitioners' claims fail because (a) there is no basis for their contention that the Fifth Circuit failed to conduct a *de novo* review; (b) the Fifth Circuit properly dismissed their claims for reasons inapposite to the question of any non-prosecutorial duty to disclose exculpatory material—including, *inter alia*, petitioners' failure to adduce *any* evidence to support their claims; and (c) there is no conflict of law which impacts the resolution of this case. In short, the petition for certiorari merits little attention and should be disposed of easily.

I. PETITIONERS' CONTENTION THAT THE FIFTH CIRCUIT FAILED TO CONDUCT A *DE NOVO* REVIEW IS UNFOUNDED

First, there is no basis for petitioners' contention that the Fifth Circuit failed to conduct a *de novo* review of the district court's decision. The order states plainly that the court "carefully reviewed the parties' briefs and pertinent portions of the record in light of the parties oral arguments" before making its decision. Pet. App. at 2a. The mere fact that the Fifth Circuit agreed with the district court's "essential findings of fact and conclusions of law," and affirmed summary judgment "essentially for the reasons stated in [the district court's] controlling opinions," *id.*, suggests nothing more than that the appellate court concurred with the lower

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[5] Petitioners also ask this Court to grant certiorari because, they claim, the court of appeals erred in its application of 28 U.S.C. § 2679(d)(5). Because that claim was not raised against the OTS Respondents, it is not addressed here.

court's analysis and felt no need to restate the identical analysis.

II. THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT THE OTS RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY AND THAT PETITIONERS FAILED TO ADDUCE COMPETENT EVIDENCE TO OVERCOME SUMMARY JUDGMENT.

Second, the court of appeals correctly affirmed the judgment of the district court that the OTS Respondents are entitled to qualified immunity from petitioners' *Bivens* claims, and that petitioners failed to adduce *any* evidence, or to demonstrate *any* personal knowledge, that *any* OTS Respondent withheld exculpatory evidence, committed perjury, or suborned perjury.[6] Despite being afforded the opportunity to take discovery in this case, petitioners were unable to uncover any evidence that any OTS Respondent violated their constitutional rights. Instead, the undisputed evidence in the case demonstrates that the OTS Respondents played no role in the prosecution of petitioners—including in any decisions regarding the production of materials to petitioners, the identity of trial witnesses, or the substance of witness testimony—nor were any of the OTS Respondents even aware of the testimony offered against petitioners at trial.[7]

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[6] Petitioners argue, without explanation, that they "submitted substantial summary judgment evidence" in opposition to the OTS Respondents' motions to dismiss, and ask that the court reject, out of hand, the "mere conclusory allegations" of the OTS Respondents. *See, e.g.*, Pet. at 5, 23. This is the same argument petitioners raised below and which was rejected multiple times by the lower courts.

[7] Here, too, petitioners simply repeat their argument, raised below, that the "undisputed summary judgment evidence demonstrates that [the OTS Respondents] were all part of the prosecution team." Pet. at 20. This argument, as well, was disputed by specific evidence and was rejected by the courts below.

The district court so held, and the appellate court agreed. Petitioners advance no compelling reason for a grant of the writ here; instead, they merely reassert the same unadorned conclusions rejected by each of the courts below.

III. THERE IS NO CONFLICT FOR THE COURT TO RESOLVE IN THIS CASE.

Third, petitioners' remaining basis for seeking the writ—*i.e.*, the lower courts' alleged "heavy reliance" on *Mowbray v. Cameron County*, 274 F.3d 269 (5th Cir. 2001)—is meritless.[8] The district and appellate courts dismissed petitioners' claims because petitioners "failed to present competent summary judgment evidence showing that a genuine issue of fact or law exists as to whether each OTS [Respondent] withheld exculpatory evidence," Pet. App. at 35a, *not* based on any purported "black-letter rule-of-law" regarding an absolute duty of non-prosecutors to produce *Brady* material to criminal defendants. Pet. at 24. Petitioners' inability to provide any evidence to support a claim against any OTS Respondent itself is sufficient to deny the writ.

In any event, by asking this court to "correct" the Fifth Circuit's decision in *Mowbray v. Cameron County*, 274 F.3d 269 (5th Cir. 2001), Pet. at 24, petitioners seek to create a conflict where none exists. Petitioners rely on a series of cases which suggest that a non-prosecutor may violate the constitution by *deliberately* concealing exculpatory evidence from the defense. Pet. App. at 18-25. But that is not this case. Respondents, citing *Mowbray*, brought this very distinction to the attention of the Court of Appeals in their appellate brief, noting that the only *conceivably* arguable

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[8] Petitioners' reference to the Seventh Circuit's decision in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), Pet. at 22-23, similarly is beside the point. Neither the OTS Respondents nor the lower courts relied on (or referred to) *Buckley* to support dismissal of petitioners' claims. Nor does *Buckley* present any conflict for this case.

basis for a *Brady* claim against them would be if there were evidence of such deliberate concealment. But the courts below agreed that such evidence does not exist here. The Fifth Circuit in *Mowbray* similarly noted the absence in that case of any facts to support a finding that the defendants "elicited false evidence" or "deliberately concealed exculpatory evidence." 274 F.3d at 278, n. 5 (distinguishing *Geter v. Fortenberry*, 849 F.2d 1550 (5th Cir. 1988), which concluded that evidence of deliberate misconduct might defeat a police officer's qualified immunity).

Because *Mowbray* is consistent with the decisions cited by petitioners for purposes of this case, there is no conflict requiring resolution. Furthermore, because there is no evidence in this case that suggests deliberate concealment, and no evidence of any deliberate falsification of evidence by the OTS Respondents—each an independent basis for the dismissal of petitioners' claims below—this case is not the best vehicle to resolve any theoretical conflict regarding the existence or scope of any duty of non-prosecutors to provide exculpatory material to criminal defendants.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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